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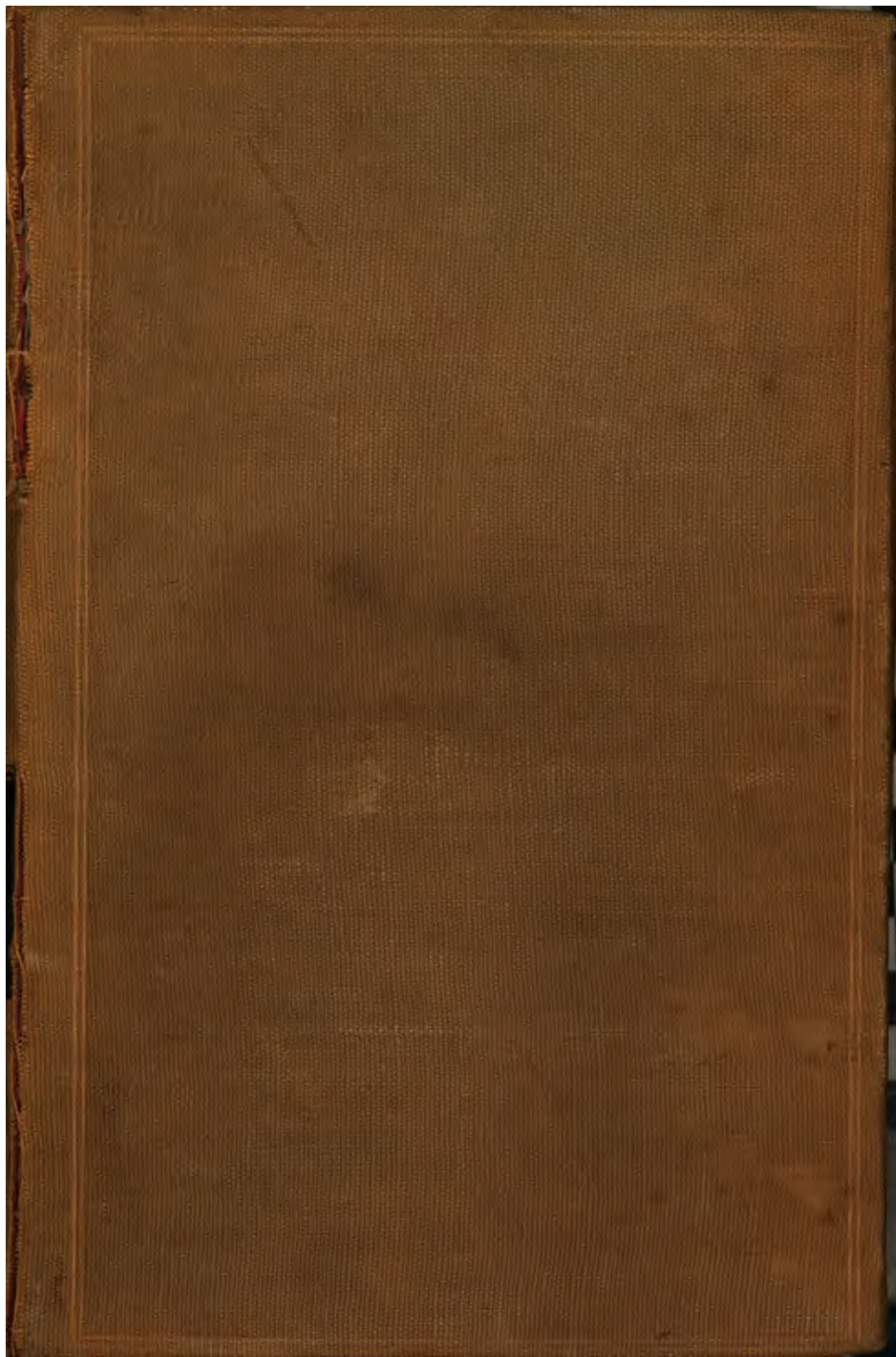
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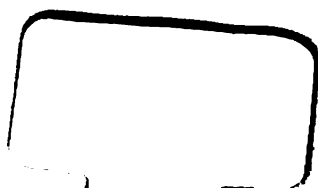
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AMERICAN ELECTRICAL CASES

(CITED AM. ELECTRL. CAS.)

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPTING
PATENT CASES) DECIDED IN THE STATE AND FED-
ERAL COURTS OF THE UNITED STATES
FROM 1873, ON SUBJECTS

RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, ELECTRICAL RAIL-
WAY, AND ALL OTHER PRACTI-
CAL USES OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

FRANK B. GILBERT

Editor of Street Railway Reports.

VOL. VIII.

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PART I.

**FRANCHISES; INCORPORATION AND MANAGEMENT
OF ELECTRIC CORPORATIONS; MUNICI-
PAL CONTROL.**

AMERICAN ELECTRICAL CASES.

GRANT OF FRANCHISE.

MORRISTOWN, CITY OF, v. EAST TENNESSEE TELEPHONE CO.

U. S. Circuit Court of Appeals, Sixth Circuit.

1. **RIGHT TO USE STREETS; ORDINANCE GRANTING FRANCHISE.**—No telegraph or telephone company can lawfully occupy the streets or alleys of a municipality without legislative authority, exercised directly by the legislature, or by a municipality in pursuance of a delegated power. When a city charter prescribes that franchises can be granted by ordinance, it is not competent to make such a grant by resolution, nor can an ordinance be amended by a resolution.
2. **REVOCATION OF FRANCHISE AFTER ACCEPTANCE.**—A franchise granted by an ordinance and amended by resolution, and accepted as amended by a telephone company is irrevocable, unless the power to revoke or alter is reserved.

Appeal from United States Circuit Court, Eastern District of Tennessee; remanded with direction to modify decree. Decided April 8, 1902; reported 115 Fed. 304.

Statement of facts:

The East Tennessee Telephone Company is a corporation organized under the law of Kentucky, which is engaged in the operation of telephone systems in various towns of Tennessee. Prior to the controversy as to its right to do a local business and conduct an exchange at Morristown, it seems to have been conducting, in Morristown, a long-distance telephone station, by which the town was connected with other towns in the vicinity in which it was doing a local business. Prior to September, 1899, the local business and exchange at Morristown was done by a local Tennessee corporation called the Morristown Telephone Company. On September 1, 1899, the council of

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Morristown passed an ordinance giving to the East Tennessee Telephone Company the right to erect poles and string wires over the streets and alleys of the city for the purpose of conducting a local telephone exchange. This ordinance fixed the maximum rate of charges, and required that the city should be given the free use of two telephones, and the right to use the company's poles for stringing a fire alarm system. September 25, 1899, a resolution was passed by the Morristown city council giving to the telephone company the right to increase its maximum charges in respect to one class of telephones. On the day following, the company, in writing, accepted the terms of the ordinance as thus amended. In pursuance of the consent thus given, the company took some steps toward the enlargement of its local facilities, and incurred some expense in preparing for furthermore considerable extensions. There seems to have been some popular discontent with the resolution allowing an increased charge for service under the action of the city council last taken, which led to the repeal on November 17, 1899, of the ordinance of September 1st. Pending the matters stated, the local company seems to have been in the hands of a receiver appointed by the Circuit Court of the United States upon a creditors' bill. Under this creditors' proceeding the entire property and franchises of the Morristown Telephone Company were brought to a judicial sale. At this sale the property and franchises of the company were purchased by the East Tennessee Telephone Company, and the sale confirmed and title vested February 28, 1900. From this time the last-named company claimed to exercise all the rights and franchises which pertained to the old Morristown Telephone Company as well as such rights and franchises as had been granted to it by virtue of the ordinance and resolution heretofore mentioned. The municipal authorities, upon the other hand, denied the validity of the ordinance under which the Morristown Telephone Company had been maintaining its poles and wires upon the streets, and denied the authority of the East Tennessee Telephone Company as a foreign corporation engaged in a competitive business to acquire the rights and franchises of the Morristown Telephone Company. The Morristown authorities also denied that the East Tennessee Telephone Company had acquired any street rights by virtue of the ordinance of September 1, 1899, or the resolution of September 15, 1899. In short, the position of the municipal authorities was that the East Tennessee Telephone Company had no authority from any source to erect or maintain a local telephone system by using the streets or alleys of the town for their posts and wires, and was therefore a trespasser upon the streets. Acting upon this line, the agents and officers of the East Tennessee Telephone Company were prevented by the municipal police from erecting poles or stringing wires for the purpose of prosecuting the business of a local telephone company. This interference is charged to have been destructive to the franchises claimed, and a remedy by injunction was therefore sought. Upon the pleadings and proof the court below granted a perpetual injunction as prayed. From this decree the municipality of Morristown has appealed, and assigned error.

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W. N. Hickey and Robt. E. L. Mountcastle, for appellant.

Edward T. Sanford, for appellee.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court:

The power of the city of Morristown, prior to the amendment of its charter by the act of April 21, 1899, to grant any street rights to the Morristown Telephone Company, is denied, and an ordinance passed February 22, 1896, giving to that company the right to erect poles and string wires on the streets and alleys of the town, subject to certain limitations, is claimed to have been an *ultra vires* act. Morristown is incorporated under a special legislative charter passed November 21, 1867. Priv. Acts Tenn. 1867-68, p. 18. Curiously enough, that charter does not, in express terms, deal with the question of the grant of privileges or franchises in the streets. Neither does it, as is usually the case, provide in so many words that the corporation shall have general "control" over its streets and alleys. Upon this rests the case against the validity of the ordinance under which the Morristown Telephone Company erected its poles on the streets of the town, and for years conducted a local telephone business without let or hindrance from the municipal authorities.

That no telegraph or telephone company can lawfully occupy the streets or alleys of a town with their poles and wires without legislative authority granted directly by the legislature, or by the municipal authority in pursuance of power delegated, is a plain and obvious proposition. That the authority to consent to the use of the streets of a town by a railway, telegraph, or telephone company resides primarily in the legislature of the State is well settled also, though usually delegated to the municipality directly concerned. *City of Knoxville v. Africa*, 23 C. C. A. 252, 77 Fed. 501, 507. That the power to grant a right of way to street railways through the streets of a town, when its motive power is animal or electricity, may be implied from a grant of general control over the streets, we had occasion to decide in *Detroit Citizens' St. Ry. Co. v. City of*

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Detroit, 12 C. C. A 365, 64 Fed. 628, 636, 26 L. R. A. 667. The court below held that while the charter of Morristown did not, in express terms, delegate to the municipality general control over its streets and alleys, the powers in reference to streets and alleys were so numerous and sweeping as to be equivalent to general control. We are not prepared to disagree with this conclusion, but find it unnecessary to determine the validity of the ordinance under which the Morristown Telephone Company established its poles and wires on the streets of the town.

By the Tennessee act of Apr. 21, '99, the charter of Morristown was so amended as to include within the powers which might be exercised by ordinance the power to grant privileges and franchises in the use of the streets. This act removed all doubt as to the power of the city, and after its enactment, and on September 1, 1899, an ordinance was duly passed giving to the East Tennessee Telephone Company the right to erect poles and string wires on the streets and alleys of the city, "in such a way and manner as not to obstruct the streets and alleys, and to erect their poles in such a way as to be the least inconvenient to the public travel, as may be agreed by the street committee." The ordinance prescribed the maximum charges to be made, and required the company to give to the city two telephones free of charge, and to allow their poles to be used for the purpose of stringing a fire-alarm system. On the 25th of September, following, the city, on application of the East Tennessee Telephone Company, amended this ordinance by a resolution increasing the maximum rate chargeable by the company for one class of telephone service. On September 26, 1899, the telephone company wrote and signed on the foot of this original resolution an acceptance in these words:

"In consideration of this resolution, together with an ordinance heretofore passed, we accept both as taken together as a contract between the East Tennessee Telephone Company and the city of Morristown."

For some unexplained reason, the city council at a meeting held October 6, 1899, passed a resolution reciting the above clause as having been "added" to the resolution without authority, and

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ordering that the minutes of the former meeting be corrected by striking out the clause of acceptance above quoted. November 17, 1899, the council formally repealed the ordinance of September 1, 1899, under the claim that the city had the right to repeal or withdraw its consent to the use of the streets, as provided by that ordinance, at any time before the ordinance had been legally accepted. The argument that the repeal occurred before acceptance is based upon two propositions: First, that the resolution of September 26th was a void thing, because the ordinance of September 1st could not be altered or annulled by resolution; 2d, that the acceptance was of the ordinance and resolution together, and, the resolution being void, the acceptance goes for nothing.

The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has too many times been declared and applied by this court to require further elaboration. *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667; *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296; *Iron Mountain R. Co. v. City of Memphis*, 37 C. C. A. 416, 96 Fed. 113; *Citizens' Ry. Co. v. Africa*, 23 C. C. A. 252, 77 Fed. 501.

The telephone company in consideration of this street easement agreed to permit its poles to be used by the city for stretching the wires of a fire-alarm system, and also to furnish two telephones free for municipal uses. The amendment of this ordinance by the resolution of September 25th was ineffectual. The charter as amended having conferred the power of granting street franchises "by ordinance," no other method was admissible. When, by statute of charter, power is conferred upon a municipal council and is silent as to the mode of action, the decision may be by either ordinance or resolution, at discretion of the council. But when the charter prescribes that franchises can be granted by ordinance

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it is not competent to make such a grant by resolution. *Board v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; *Dill Mun. Corp.* (2d ed.), § 244 *et seq.*, and notes; *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815; *Van Vorst v. Jersey City*, 27 N. J. Law, 493; *City of Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503; *Illinois Trust & Sav. Bank v. Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518.

The by-laws of the city required that an ordinance should be passed at two separate meetings. No such requirement exists as to the passing of a resolution. So far as the resolution sought to alter any term or condition upon which the ordinance granted an easement in the streets to the East Tennessee Telephone Company its invalidity must be conceded; for it would seem to follow that if a franchise can only be granted by an ordinance that such an ordinance can only be altered or amended, in respect to any of its terms or conditions, by another ordinance, and not by a mere resolution. This brings us to the crux of the case. The ordinance conferring the right to erect and maintain its poles and wires upon the streets was repealed by an ordinance passed November 17, 1899.

The learned counsel for the appellant concede that if there had been an "unequivocal acceptance of this consent ordinance, and substantial action under its terms, that it would have constituted an inviolable contract. *City of Knoxville v. Africa*, 23 C. C. A. 252, 77 Fed. 501; *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667.

The right to revoke the easement granted is based upon the fact that the telephone company, in writing, accepted the ordinance only as amended by the invalid resolution. This acceptance, it is said, was but a conditional acceptance, and that, if the resolution turn out to be ineffective as an amendment or alteration of the terms of the consent ordinance, the acceptance goes for nothing. The position is untenable. The telephone company, under the circumstances, might very well have said, upon discovery, that the modification of the terms of the ordinance had not been made in a valid manner, "that it would not avail itself of the franchise granted, and was not bound to carry out any implied agreement to construct or maintain

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a local telephone system, as its acceptance of the street franchise had been based upon the supposed validity of the resolution modifying the terms of the ordinance granting a street easement." But this it has not done, and does not now say. On the contrary, it in effect says: "Although I have not so good a contract as I desired and supposed I had, yet I stand upon the rights conceded me by the valid ordinance, and upon the terms and conditions there prescribed."

An ordinance conferring street easements in excess of the power of the municipality to grant is not necessarily void. For example, ordinances conferring exclusive rights by a municipality having no power to grant exclusive rights have been held valid so far as to convey a right, subject to the right of the city to grant like privileges in same streets to others. *Levis v. City of Newton* (C. C.), 75 Fed. 884; *City of Waterloo v. Waterloo St. Ry. Co.*, 71 Iowa, 193, 32 N. W. 329.

The same rule would apply to an ordinance valid in part and invalid in part which is applicable to a statute. If the grants are so distinctly separable that each can stand alone, and the court is able to see that there is no such interdependence as to make the validity of a part depend upon the validity of every part, the ordinance will be upheld so far as valid. But here nothing has failed but an effort to amend an ordinance confessedly valid. The amendment was one proposed by the telephone company, and wholly in its interest. If it chooses to go on, although the modifying resolution has failed to accomplish its purpose, it is not for the city to escape responsibility upon the assumption that everything done by the telephone company in acceptance of the easements granted was made dependent upon the validity of this amending resolution. The plain purpose of the telephone company, by its written acceptance and by the subsequent prosecution of the work of putting in its local lines, was to avail itself of the grant made by the ordinance. Undoubtedly it acted upon the theory that the resolution had worked a valid modification of the ordinance, and this it has maintained to the end of this litigation. This contention it has now lost, and it is now confronted with the novel claim that the easement remained revocable,

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because its acceptance included a supposed modification which turns out to have been irregularly granted, and therefore invalid. The acceptance of the grant by writing and by acts prior to the repealing ordinance was, in our judgment, such as to give the ordinance, so far as valid, effect as a contractual ordinance, and render it irrevocable.

Street rights so vested cannot be divested without the consent of both parties or by clear acts of abandonment indicating an intention not to accept. *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296. The street rights thus granted are, of course, subject to the provisions of the ordinance itself, as well as the police power of the city, which can never be contracted away.

Whether the Morristown Telephone Company had any street easement, and whether the appellees, as purchasers of its property, acquired such street rights as it had, we do not decide. That it acquired the physical property of that company is not denied. What we do decide is that the East Tennessee Telephone Company acquired a valid and irrevocable right to erect its poles and string its wires on and over the streets and alleys of Morristown, under and subject to the terms and provisions of the ordinance of September 1, 1899. We also hold that the resolution of September 25, 1899, was ineffective as an amendment of the prior ordinance, and that the East Tennessee Telephone Company, by its acts and deeds, has accepted the terms of the ordinance of September 1, 1899.

We also decide that the ordinance repealing the ordinance of September 1, 1899, was ineffective to deprive the telephone company of the easement granted under the ordinance of September 1, 1899. The street rights thus acquired must be held subject to the provisions of the ordinance under which they were granted, and also subject to the reasonable regulations of the municipality by virtue of its police power. *City of Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160.

The general result below was sound, and is affirmed, but the appellant is entitled to have the injunction modified as indicated by this opinion. Remand, with directions to modify the decree. Costs of this court will be divided.

Chamberlain v. Iowa Telephone Co.

Franchise once accepted not to be revoked.—A municipal ordinance granting to a particular company authority to construct and maintain telephone lines on the streets of a city, without any limitation as to time, and for a stipulated consideration, when accepted and acted upon by the grantee by a compliance with all its conditions and the construction of a valuable and extensive plant, acquires thereby the features of a contract, which the city cannot thereafter abolish or alter in its essential terms, without the consent of the grantee. The imposition of new and burdensome considerations is a violation thereof. *New Orleans, City of, v. Great Southern Teleph. & Teleg. Co.*, 2 Am. Electl. Cas. 122, 40 La. Ann. 41, 3 So. 533. See, also, *Hudson Teleph. Co. v. Mayor, etc., of Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, 8 Atl. 123; *Michigan Teleph. Co. v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 7 Am. Elect. Cas. 168, 81 Minn. 140, 83 N. W. 527; *Mahan v. Michigan Teleph. Co.*, 8 Am. Electl. Cas. 38, 93 N. W. 630; *Baxter Springs, City of, v. Baxter Springs Light & P. Co.*, 8 Am. Electl. Cas. 125, 64 Kan. 591, 68 Pac. 63; *Duluth, City of, v. Duluth Teleph. Co.*, 8 Am. Electl. Cas. 136, 84 Minn. 486, 87 N. W. 1128; *State ex rel. Wisconsin Teleph. Co. v. City of Sheboygan*, 8 Am. Electl. Cas. 155, 114 Wis. 505, 90 N. W. 441. See, also, monographic note, "Use of Streets and Highways by Telegraph and Telephone Companies," *post*, p. 159.

The consent of a common council for the erection of wires and poles in a street by an electric railway, and prescribing the size and location of the poles, and limiting the speed of railroads when operated by electricity must, under the charter of the city of Newark, be by ordinance, and not by resolution. *Halsey v. City of Newark*, 6 Am. Electl. Cas. 40, 54 N. J. Law, 102, 23 Atl. 284.

CHAMBERLAIN V. IOWA TELEPHONE CO.

Iowa; Supreme Court.

1. STATUTE AUTHORIZING TELEPHONE COMPANY TO USE PUBLIC HIGHWAYS.—

A statute of Iowa (Code 1873, § 1324), as amended by Laws 19th Gen. Assem. ch. 104, authorizing any person or company to construct a telegraph or telephone line along public highways, held sufficient to include city streets and to permit their occupancy by a telephone company without the city's consent.

Appeal by defendant from an order restraining the occupancy by it of city streets. Decided February 12, 1903; reported 119 Iowa, 619, 93 N. W. 596.

E. E. Cook, L. G. Richardson and N. T. Guernsey, for appellant.

J. C. Hume, for appellees.

Opinion by SHERWIN, J.:

The plaintiffs are residents and taxpayers of the city of Des Moines, owning residences fronting upon West Grand avenue, in said city, along which the defendant maintains a telephone line as a part of its plant extending over the city. This plant was originally built by the Des Moines Telephone Exchange Company about 1880, and in 1881 was sold to the Western Telephone Company, who in turn sold it to the Central Union Telephone Company, whose successor the defendant is. In 1891 the city council of Des Moines granted to the Central Union Telephone Company a five-year franchise, authorizing it to occupy the city streets and alleys with its poles and lines. This franchise, or the ordinance granting it, was accepted in writing by the telephone company, and its plant operated thereunder for the designated period. There has never been a renewal of the franchise, and since its expiration various efforts have been made by the city to oust the defendant from the use of its streets and alleys. The defendant refuses to vacate, on the ground that it has the right to so occupy the city's streets and alleys under authority given by section 1324 of the Code of 1873, as amended by chapter 104 of the Laws of the 19th General Assembly, as follows: "Any person or company may construct a telegraph or telephone line along the public highways of this State or across the rivers, or over any lands belonging to the State or to any private individual, and may erect the necessary fixtures therefor." The question, then, is whether this statute gave telegraph and telephone companies the right to occupy the streets and alleys in cities and incorporated towns without authority from such cities and towns. That the legislature has, in the absence of constitutional restraint, full and paramount authority over all public ways, whether urban or rural, is well settled and conceded. It is also conceded that a city cannot, without ex-

press statutory authority, authorize the use of its streets by private persons, and it is not contended that such power had ever been given the city of Des Moines prior to the Code of 1897. The part of section 1324 of the Code of 1873 material to the question before us was the same as section 1348 of the revision and section 780 of the Code of 1851, and until its amendment in 1882 applied to telegraph companies only. The intention of the legislature which passed this act is the first thing to be sought, and the meaning of the words "public highways," as used therein, must depend on this intent, as it can be gathered from either the words, the context, the subject-matter, the effect and consequences, or the spirit and reason of the law." 1 Cooley's Blackstone, 59; 15 Am. & Eng. Enc. Law, 350 (2d ed.). It is the general holding that "the term 'highway' is the generic name for all kinds of public ways, including county and township roads and streets and alleys." Elliott on Roads and Streets, 1 (2d ed.); *Stokes et als. v. The County of Scott*, 10 Iowa, 166; *Sachs v. City of Sioux City*, 109 Iowa, 224, 80 N. W. 336. That the term does not, in all instances, include or mean streets and alleys, may be admitted, but that it is broad enough to include them cannot be denied. When this act first became law, telegraphy was in its infancy, the Morse system having been first used for commercial purposes between Baltimore and Washington in 1844. This State was at that time in its infancy also, having but few cities and incorporated towns, none with large populations, and having a vast area of productive land wholly unoccupied, over which no highways had then been regularly laid out or established. The commercial interests of the State were at that time confined to a comparatively small territory, and were generally located along the great water highways bounding the State on the east and on the west. Its agricultural interests were small, and limited in area. It is a matter of common knowledge that the first great use to which the telegraph was put was for commercial purposes, and that to accommodate the public, and to secure this business, its terminals must be located in the larger business centers, where, as a matter of fact, they have always been located. That was the condition when the act in question was first passed,

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stitute parts of the highway," and said, "As 'highway' is the broader term, it would seem it should be held to include streets, and, if so, a bridge must be construed, under these statutes, as a part of the street." The Supreme Court of Minnesota has recently had under consideration a telephone right of way statute very similar to our own, and holds that it gave the right to use urban as well as rural ways. *Northwestern Telephone Exchange Company v. The City of Minneapolis et al.*, 7 Am. Electl. Cas. 168, 86 N. W. 69, 53 L. R. A. 175. See, also, *City of Duluth v. Duluth Telephone Co.* (Minn.), 8 Am. Electl. Cas. 136, 87 N. Y. 1127; and *Abbott v. The City of Duluth* (C. C.), 104 Fed. 833.

In the case of *Milburn v. The City of Cedar Rapids*, 12 Iowa, 246, this court had under consideration sections 1321 and 1322 of the revision of 1860, which were as follows:

"Sec. 1321. Any railroad corporation may raise or lower any turnpike, plank road, or other way for the purpose of having their railroad pass over or under the same; and in such cases said corporation shall put such turnpike, plank road, or other way, as soon as may be, in as good repair and condition as before such alteration.

"Sec. 1322. If the proprietors of said plank road or turnpike, or the trustees or city council having jurisdiction of such ways, respectively, require further alterations or amendments of such turnpike, road, or way, and give notice thereof in writing to the agent or secretary of such railroad corporation, and if the parties cannot agree respecting the same, either of the parties may apply to the county judge, who, after reasonable notice to the adverse party, shall make determinations respecting such proposed alterations or amendments, and shall award costs in favor of the prevailing party."

And it was held that section 1321 gave to railroad companies "the privilege of running their tracks upon the streets of the city." The opinion seems to rest upon the construction of 1321 alone, and, so construed, is in harmony with what we have heretofore said. But it is argued by the appellee that it is based upon the joint construction of both sections, because section 1322 gave to city councils having jurisdiction of such ways some control over the contemplated alterations. But, if this position be conceded, it follows that the case is directly in point, and supports the appellant's contention that statutes which are *in pari materia* should

be construed together, for, when read together, sections 1321 and 1322 present practically the same condition that existed after the enactment of the statute of 1888, giving cities control over telegraph and telephone companies.

Whatever rights telegraph companies were given by the original act were conferred upon telephone companies by chapter 104 of the Laws of the 19th General Assembly. It matters not whether telegraph companies made a limited use of the streets and alleys of cities or not. They were not so limited by the law, and this was well known. It was also known by all that the principal business of telephone companies was confined to urban ways. True, they had then used rural ways to a limited extent, and it may have been apparent to the legislature that the rural service would be extended, and the long-distance phone finally become one of the great public conveniences and necessities which it now is. But, notwithstanding this, they were given the use of highways and streets without limitation, and without control by city authorities. If the legislature had intended to limit their use of the streets to long-distance service, it would doubtless have done so by the use of apt words. That such was not its intention is further manifest from the fact that prior to the amendatory act in question this court had practically held that the words "telegraph companies," as used in the statute, included telephone companies. *Iowa Telephone Co. v. Board of Equalization*, 1 Am. Electl. Cas. 799, 67 Iowa, 250, 25 N. W. 155; *Franklin v. Northwestern Telephone Co.*, 2 Am. Electl. Cas. 439, 69 Iowa, 97, 28 N. W. 461. But our decision need not rest on the foregoing considerations alone. The 22d General Assembly, by chapter 1 of its acts, provided for a board of public works in all cities of the first class having a population of more than 30,000, and further provided:

"It shall have power and be required by and with the advice of the city engineer to superintend the laying of all water, gas and steam heating mains and all connections therefor, and laying of telephone, telegraph, district telegraph and electric wires in the manner provided by the ordinances of such city."

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And by chapter 16 of its acts it gave additional powers to certain cities; among others, the power "to regulate telegraph, telephone, electric light, district telegraph, and other electric wires, and provide the manner in which and the places where the same shall be placed, upon, along, or under the streets and alleys of such cities." It can hardly be seriously argued that the quoted language from these two acts does not relate to the use of streets and alleys by telegraph and telephone companies; and, if the acts do relate to that matter, they must be taken into consideration in construing the telegraph and telephone statute, for it is a rule of universal application that several statutes relating to the same thing must be so considered. *Harriman v. State*, 2 G. Greene, 270; *State v. Shaw*, 28 Iowa, 78; *State v. Sherman*, 46 Iowa, 415; 1 Cooley's Blackstone, 60-62 (4th ed.). In *Alexander v. Alexandria*, 5 Cranch, 1, 3 L. Ed. 19, Chief Justice MARSHALL said:

"If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the Legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

See, also, *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724. If any doubt could exist as to the meaning or intention of the previous statutes, it is removed by the construction given it by the legislature in the later acts above set out, for they should be regarded "legislative interpretation thereof." *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832; *Stockdale v. The Insurance Company*, 20 Wall. 323, 22 L. Ed. 348; *Town of Highgate v. State* (Vt.), 7 Atl. 898. "The legislature is presumed to have had former statutes before it," and to have known fully their scope and purpose. *State v. Gerhardt* (Ind. Sup.), 44 N. E. 469, 33 L. R. A. 313. If the telephone right of way statute did not confer the power to use streets in cities, the legislature would not have given cities control over the location of the poles and wires. When, however, the statutes are construed together, they are in perfect accord.

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We reach the conclusion that the defendant's use of the streets and alleys in Des Moines is authorized by the statute, and that its Grand avenue line is not a nuisance *per se*. As the main case is pending this decision, we do not determine any other questions.

Reversed.

EAST TENNESSEE TELEPHONE CO. v. ANDERSON COUNTY TELEPHONE CO.

Kentucky; Court of Appeals.

1. **CONSENT OF LOCAL AUTHORITIES TO CONSTRUCTION OF TELEPHONE LINE; INJUNCTION.**—A constitutional provision (Ky. Const. sec. 163), to the effect that a telephone company shall not be permitted to erect its poles or other apparatus in the streets of a city or town without the consent of the proper legislative body of such city or village being first obtained is mandatory, and must be complied with before a telephone company can use the streets of a city for the conduct of its business. Where an existing telephone company had sued out an injunction to restrain a like company from erecting its poles and apparatus in the streets of a city, and its petition had been dismissed on the ground that its franchise was void, and the latter company had itself failed to comply with the above constitutional provision, an action will not lie on behalf of the latter company to recover damages because it had been prevented by injunction from doing that which it had no right to do.

Appeal by defendants from judgment in favor of plaintiff. Decided May 5, 1903; reported 74 S. W. 218.

F. R. Feland and Mumphrey, Burnett & Mumphrey, for appellants.

Willis & Willis and L. C. Carter, for appellee.

Opinion by BURNAM, C. J.:

On the 10th day of August, 1899, the East Tennessee Telephone Company sued out an injunction against the Anderson

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County Telephone Company, and enjoined them from "erecting poles, posts, and other apparatus preparatory to or necessary to be used in the operation of a telephone exchange along, over, under or across the public streets, alleys or public ways of Lawrenceburg," upon the ground that by the contract with the city of Lawrenceburg they had an exclusive franchise to establish and operate a telephone system therein. The Anderson county company defended the suit upon the ground that the ordinance adopted by the city council granting the franchise to the plaintiff did not lie over five days, as required by section 3636 of the Kentucky Statutes, and was, therefore, void. This contention was sustained, and the East Tennessee Telephone Company's petition dismissed. See *East Tennessee Telephone Co. v. Anderson Tel. Co.* (Ky.), 57 S. W. 457. Thereupon the Anderson county company brought this suit for damages on the injunction bond executed by the East Tennessee Telephone Company at the institution of their suit. In the first paragraph of their petition they allege "that they had authority to construct and operate a telephone line and exchange in the city of Lawrenceburg." This allegation is specifically denied in the answer, and the defendant pleads affirmatively that the plaintiff did not, before proceeding to erect their poles in the public streets and alleys of the city for the purpose of conducting a telephone business, obtain and procure any consent of the city authorities to do so. A motion by the plaintiff to strike this allegation from the answer was overruled, and in their reply they admit this averment to be true, but allege that the city authorities made no objection to their doing so, and aver that this was no concern of the defendant, and that it had no right to rely upon the absence of such authority. The defendant moved to strike out so much of the reply as pleaded that they could not rely upon plaintiff's want of authority. This motion was also overruled, and the issues were made up by controverting the affirmative averments of the reply. The trial resulted in a judgment in favor of the plaintiff for \$2,000, and the defendant has appealed.

Section 163 of the Constitution is as follows:

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"No telephone company shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work had in good faith been begun thereunder, the provisions of this section shall not apply."

This section of the Constitution is mandatory and highly important, and, as the Anderson Telephone Company failed to comply with its provisions or the statute passed pursuant thereto, it is clear that they had no right to use the streets or highways of the city of Lawrenceburg for the conduct of their business. The question, then, arises whether they can recover damages against the East Tennessee Telephone Company because that company, by injunction, prevented them from doing an unlawful thing. The gist of the plaintiff's complaint is that they were prevented by an injunction sued out by defendant from exercising a lawful right. If they were violating the law in erecting their poles and wires upon the streets of Lawrenceburg without authority of the city authorities, the presumption is that they would have been stopped by these authorities in due course. The question raised by the defense is a new one in this State, although manifestly sound and logical on principle. And we have been cited by counsel for appellant to a number of cases which fully sustain their contention. In *Bangor, etc. R. R. Co. v. Smith*, 77 Am. Dec. 246, the railroad company undertook to construct a branch track of their railroad over a public highway in Oldtown. The defendant, with others, denied the right of the plaintiffs to construct the branch track as claimed by them, and interfered and prevented it. After this interference the railroad company brought suit, setting forth their right to construct such track, and that by the acts of the defendant they were prevented from constructing it. When this case was brought to the Supreme Court of Maine, it was held that plaintiffs did not have legal authority to construct their track in the way and manner proposed by them. The court then said:

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"Undertaking what by law they were not authorized to do, and what, if done, would have been the proper subject of an indictment, they were prevented by the defendant from executing their unlawful purpose. The action, then, is one in which the plaintiffs claim damages because they were prevented from doing an illegal act, and for which, if done, those engaged in its commission would have been criminally punishable. It is difficult to perceive how the prevention of an offense constitutes a valid cause of action on the part of the would-be offender, who is interfered with in the commission of his intended offense. It is still more difficult to understand how any damages can have been sustained by reason of such interference. . . . The right to lay the branch track was asserted by the plaintiffs and denied by the defendant. It was the only question at issue between these parties. The plaintiffs attempted what they were not authorized to do, and the defendant resisted, and the court affirmed the propriety of that resistance. If the defendant entered wrongfully on the land of Gen. Veazie, and thus were prevented the further prosecution of the plaintiffs' undertakings, it may be a trespass for which he would be liable to the owner of the soil; but such is not the subject of this suit, nor is this an action of trespass. If the defendant violently interfered with the laborers in the plaintiffs' employ before the branch track they were laying had reached the public highway, he may be liable to them severally for any assault he may have committed; but the declaration in this case discloses no such cause of action. The prevention of the doing of an unlawful and unauthorized act does not *per se* constitute a good cause of action on the part of the would-be incipient wrongdoer, and that is the whole of the plaintiffs' case. Plaintiffs nonsuit."

In *Macey v. Titcombe*, 19 Ind. 137, plaintiffs brought suit to enjoin certain contractors from executing a contract with the city, and obtained an injunction, which was dissolved. Thereupon suit was brought against them on the bond. The court held that, to constitute a cause of action on the bond, the plaintiff must show that he had a lawful contract for the improvement of the street with the city. The complaint alleged that the improvement had been ordered by the city council, and that a contract had been entered into with him for making it; but it failed to show that there had been advertisement for bids, and without such advertisement the contract was void. The court said:

"The plaintiff in a suit on an injunction bond must show a legal contract to have been enjoined."

In *Hibbs v. Western Land Co.*, 81 Iowa, 285, 46 N. W. 1119, the petition in an action for damages on an injunction bond

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alleged that the defendant caused an injunction to be issued restraining plaintiff from trespassing on certain real estate, and that he was put to great trouble and expense defending the wrongful issuance of such injunction, and in obtaining its dissolution, but did not set up what ground the injunction was issued upon, nor upon what ground it was dissolved, nor that the plaintiff was thereby prevented from the exercise and enjoyment of some legal right to which he was entitled. It was held bad on demurrer, the court saying:

“In order to recover damages on an injunction bond, it is necessary that it should appear that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise, and which he was entitled to enjoy. If the injunction in this case deprived the plaintiff herein of any right, or restrained him from taking possession of land to the possession of which he had a right, and the possession was of some value, we think he might maintain an action on the bond. The condition of the injunction bond is that the obligors will pay the damages sustained by reason of the injunction. The gist of the action is damage sustained by being deprived of some right. The petition does not contain any averment that such damages were sustained, and we think the District Court correctly sustained the demurrer.”

In *Turnpike Co. v. Kelley*, 41 Ohio St. 144, the company incorporated under the Ohio laws in 1857, and constructed a turnpike from the city of Cincinnati to the village of Warsaw, and established a tollgate at a point more than 80 rods from the city limits. In December, 1869, the city limits were legally extended so as to include the tollgate, but the company continued to collect tolls, when in 1875 Kelley sued out an injunction forbidding the further taking of toll at said gate, and gave bond with sureties conditioned as required by the statute. The final judgment found “the equity of the case to be with the defendant,” and dismissed the action. The company sued on the bond. The answer denied that the injunction prevented the collection of any lawful tolls. It was held that, notwithstanding the judgment in the injunction suit, the company could not recover as damages tolls that it could not lawfully have collected if the injunction had not been granted under the statute.

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A suggestion by counsel we think admirably illustrates the soundness of the rule: Suppose, says he, that an administrator of an estate, finding some person about to commit waste by cutting down and carrying off valuable timber trees, were to procure an injunction, and give bond to answer in damages, which should be dissolved on the ground that an administrator had nothing to do with the real estate of his decedent. Can it be claimed that the defendant in such case could bring a suit against the administrator and his surety on the injunction bond, showing that, if he had not been enjoined, he could have cut down and carried off \$2,000 worth of trees? In the former suit it was decided that appellant could not enjoin appellee from erecting its plant in Lawrenceburg upon the sole ground that its contract with the city for an exclusive franchise was void for failure on the part of the city to comply with the statute in the passage of the ordinance granting the right. The rights of the Anderson County Telephone Company were not passed upon at all. In this action they can only recover upon the ground that they were prevented by an injunction sued out by appellee from exercising a lawful right to occupy the streets of the city with their plant. As it is conclusively shown they had no such legal right, but were mere trespassers, they have no standing in court. For reasons indicated, the trial court should have peremptorily instructed the jury to find a verdict for the defendant.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

Use of streets by consent of local authorities, see monographic note, "Use of Streets and Highways by Telegraph and Telephone Companies," *post*, p. 159. Authorization and supervision of electrical appliances in streets are matters for municipal regulation. *Consolidated Elect. L. Co. v. People's Elec. L. & Gas Co.*, 4 Am. Electl. Cas. 250, 94 Ala. 250, 10 South. 450. A municipality has the right, and it is its duty to supervise and control the erection and maintenance of telegraph poles and wires within its limits. *Allentown v. West. Union Teleg. Co.*, 4 Am. Electl. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070; see, also, note to *Philadelphia v. Atlantic & Pacific Teleg. Co.*, 7 Am. Electl. Cas. 226, 233; note to *Grand Ave. Ry. Co. v. People's Ry. Co.*, 6 Am. Electl. Cas. 99, 106.

Postal Telegraph Cable Co. v. City of Newport.

Failure to comply with ordinance.—A telephone company having planted poles without having complied with a city ordinance requiring it to submit to the mayor the number, size and position of its poles, and to pay a license fee, cannot complain of the act of an abutting owner in cutting down one of such poles planted in the street in front of his property. *York Teleph. Co. v. Keesey*, 6 Am. Electl. Cas. 107, 5 Pa. Dist. R. 366.

POSTAL TELEGRAPH CABLE CO. V. CITY OF NEWPORT.

Kentucky; Court of Appeals.

1. **CONSTRUCTION OF TELEGRAPH LINES ALONG STREETS AND HIGHWAYS.**—The act of Congress (approved July 24, 1866, ch. 230, 14 Stat. 221), authorizing the construction of telegraph lines along military and post roads, and declaring all public roads and highways, and all letter carrier roads established in any city or town for the collection and delivery of mail, to be post roads, does not confer upon a telegraph company accepting the provisions of such act the right to use the streets and alleys of a municipality except under ordinance of such municipality.
2. **ORDINANCE GRANTING USE OF STREETS TO TELEGRAPH COMPANY.**—Where a telegraph company enters upon the streets after the passage of a municipal ordinance, authorizing it to use such streets upon the payment of an annual license tax, and constructs its system, it will be deemed an acceptance of the ordinance in the absence of an expressed disclaimer. After the company has so constructed its system it cannot complain of the imposition of the tax. The license tax is a compensation for the servitude imposed upon the streets, and is not in the nature of a burden upon interstate commerce under the guise of a license tax.

Appeal by defendant from judgment for plaintiff. Decided October 14, 1903.

Harland Cleveland, for appellant.

Aubrey Barbour, for appellee.

Opinion by HOBSON, J.:

The city of Newport, by an ordinance of December 5, 1895, granted to the Postal Telegraph Cable Company the right to use

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the streets and alleys of the city for the purpose of erecting its poles and stringing its wires, and it was provided in the ordinance that the company should pay the city a license tax of \$100 per annum. This suit was filed on September 9, 1899, by the city against the company; it was alleged in the petition that the defendant secured from the plaintiff the use of its streets for the purpose named by the ordinance referred to; and that thereunder the defendant had erected its poles and strung its wires in the streets and alleys of the city, and had since enjoyed the rights and privileges granted to it, and had thereby accepted the ordinance, but that in disregard of its contract it had failed to pay the city the \$100 due for the year ending December 5, 1897, or for the year ending December 5, 1898. A copy of the ordinance was filed with the petitioner as an exhibit, and judgment was prayed for the \$200 due. The defendant filed an answer, in which it admitted the passage of the ordinance, but denied that it thereby acquired the right to use the streets and alleys. It alleged that by the ordinance it was provided, in substance, that if the company failed within 30 days after the approval of the ordinance to signify to the General Council its acceptance of the grant in writing subject to the limitations therein set out, then all the rights and privileges granted should become null and void and of no effect. It alleged that it did not accept in writing or otherwise the provisions of the ordinance, but it admitted that shortly after the passage of the ordinance it began the erection of its poles and the stringing of its wires in and over the streets and alleys of the city, and has since operated its system thereon. Further answering, the defendant alleged that on March 17, 1866, it accepted the act of Congress approved July 24, 1866, ch. 230, 14 Stat. 221, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and the acts amendatory thereof, and that by the statutes of the United States it thus acquired the right to construct and operate its lines over and along all military and post roads of the United States, and that all public roads and highways and all letter carrier routes established in any city or town for the col-

lection and delivery of mail were by these statutes declared post roads; that all the streets and alleys of the city of Newport are such post roads, and that it had erected its poles and strung its wires therein under the acts of Congress, and that it voluntarily submitted to such provisions of the ordinance as related to the manner in which its poles should be erected, but not to so much of it as required it to pay \$100 a year; that it paid its taxes as other taxpayers; that other companies are using the streets just as it is using them, without being required to pay \$100 a year; that there was no consideration for the alleged contract which made an unreasonable discrimination between the defendant and other telegraph companies, and was in violation of the interstate commerce clause of the United States Constitution and the act of Congress on the subject of post roads. The court sustained a demurrer to the answer after it had been several times amended, and, the defendant failing to plead further, entered judgment in favor of the plaintiff. A reversal is sought in this court on the ground that under the denials of the answer the ordinance cannot be treated as a contract, but only as a license tax, which is void under the United States Constitution as a restriction on interstate commerce, and also void under the State constitution because unreasonable and not uniform.

The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a State or one of its municipalities than the property of an individual. The acts of Congress, referred to in the answer, conferred on the defendant no right to use the streets and alleys of the city of Newport which belonged to the municipality. This was expressly held in *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, and *Postal Telegraph Cable Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399. The acts of Congress are only permissive so far as the rights of the Federal government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so, except under the ordinance. Its action was an acceptance of the

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ordinance in the absence of some expressed disclaimer, which is not alleged. Its failure to accept the ordinance in writing might be waived by the city, and this waiver may be implied from its acquiescence in the defendant's acts. Besides, the ordinance which was made a part of the petition, a copy of it being filed therewith, is not copied in the transcript, and it must be presumed it sustained the judgment rendered on this point.

This is not the case of a license tax imposed on a telegraph company already in the use of the streets and alleys of the city. The defendant entered the city and got the use of the streets and alleys by virtue of the ordinance, and took its rights subject to the charge which the city made for the grant. The question of the reasonableness of the grant was for the parties to decide. If the defendant was not satisfied with the terms of the grant it could have refused to accept it. It is not material now how many poles the defendant set up; the city took its chance on these things, and fixed a lump sum. The defendant in going ahead under the ordinance also took its chance, and it cannot be heard to say now that the charge was too high. The poles and wires in the street are a serious servitude, and, although the defendant was a foreign corporation and engaged in interstate commerce, it could not impose this servitude upon the city, thus taking its property without compensation. What was a fair compensation for the servitude was a question for the parties to decide. The contract was not without consideration, nor is it to be construed as imposing a license tax, and therefore the case does not fall within the line of decisions to the effect that a State cannot impose any burden upon interstate commerce within its limits under the guise of a license tax.

This also disposes of the objection that the ordinance is void under the constitution and laws of the State of Kentucky, on the ground that municipal corporations are without power to exact license taxes from some and not from others engaged in the same business. It is not alleged that the city has admitted any other company to use its streets without compensation. The other companies referred to in the answer, for all that appears therein, may have acquired their rights on other terms and before the adoption

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of the present constitution. There is nothing, therefore, to show any discrimination. No other questions are made, and on the whole case we are of the opinion the court properly sustained the demurrer to the answer.

Judgment affirmed.

As to license taxes on telegraph and telephone, see *Atlantic & Pacific Teleg. Co. v. City of Philadelphia*, 8 Am. Electl. Cas. 369 (and note on p. 385 *post*), 23 Sup. Ct. 817; *State v. Rocky Mountain Bell Teleph. Co.*, 8 Am. Electl. Cas. 369, 27 Mont. 394, 71 Pac. 311; *Western Un. Teleg. Co. v. Village of Wakefield*, 8 Am. Electl. Cas. 380 (Neb.), 95 N. W. 659; and see, also, cases cited in note on p. 385, *post*.

Such license fee cannot be imposed where a franchise has been granted with certain conditions, which have been accepted by the company. *St. Louis, City of, v. Western Union Teleg. Co.*, 5 Am. Electl. Cas. 43. Nor can a municipal corporation impose a rental for the use of its streets upon telegraph companies which are by statute permitted to occupy streets for the maintenance of their lines without charge. *Hodges v. Western Union Teleg. Co.*, 5 Am. Electl. Cas. 56, 72 Miss. 910, 10 So. 84.

 ST. PAUL, CITY OF, v. FREEDY.

Minnesota; Supreme Court.

1. **FRANCHISE FOR EXTENSION OF TELEPHONE LINES.**—The common council of the city of St. Paul granted permission to the Northwestern Telephone Exchange Company, in accordance with its request therefor, to extend its telephone poles and wires along certain streets upon condition that the commissioner of public works should designate the location of the poles to be erected, and that the extension of the system should be acceptable to and approved by him. *Held*, that under the permission granted the company had no authority to locate its poles and extend its system without securing the commissioner's action as required by the permit.
2. **ARREST OF MANAGER FOR VIOLATION OF ORDINANCE.**—The appellant, manager of the telephone company, having been arrested for violating an ordinance prohibiting excavations in any street, it was no defense that the commissioner refused to act for arbitrary and unjustifiable reasons.
(Syllabus by the court.)

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Appeal by defendant from conviction for violation of city ordinance. Decided June 6, 1902; reported 86 Minn. 350, 90 N. W. 781.

C. D. and Thos. D. O'Brien, for appellant.

James E. Markham and F. H. Griggs, for appellee.

Opinion by LEWIS, J.:

On November 5, 1901, appellant, as manager of the Northwestern Telephone Exchange Company, in the city of St. Paul, caused an excavation to be made on Burns avenue for the erection of a pole necessary in extending its telephone system, and was immediately arrested for violating Ordinance No. 436, prohibiting the making of an excavation in any street without a permit from the city engineer. At the trial appellant attempted to justify his action upon the ground that the city council had passed a resolution granting to the company the privilege of erecting poles on that avenue, but that the commissioner of public works had refused to designate the location of the poles, as required by the resolution, upon the advice of the city legal department that the resolution was illegal, and that a permit should not be allowed, nor a designation be made, unless the company consented to the five per cent. gross earnings tax; and that because of such arbitrary refusal on the commissioner's part appellant felt justified in proceeding as he did. It was shown that the pole so erected was in accordance with the general plan and the usual manner theretofore adopted by the city. From the judgment entered in the Municipal Court adjudging appellant guilty of violating this ordinance, he appealed to this court.

The resolution referred to reads as follows:

"Resolved, that permission is hereby granted to the Northwestern Telephone Exchange Company, in accordance with their request therefor, to put up and to maintain until further orders the necessary poles to support the necessary telephone wires on the following named streets and alleys of the city of St. Paul: On Burns avenue, from Earl street to Hester avenue. . . . This permission is granted upon condition that the city of St. Paul, by

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resolution of its common council, may at any time order all or any portion of said poles and wires to be taken down and removed from the street, and on the further condition that the location of all said poles shall be designated by the commissioner of public works of said city; that, when placed in alleys, none of them shall be placed so near to the intersecting street as to mar or disfigure the street so intersected, and that said entire construction shall be acceptable to and approved by said commissioner of public works."

For the purposes of this case we shall assume that the resolution referred to was legal, and had the effect of granting to the telephone company all the power or right which could have been conferred by ordinance, and we will therefore not discuss the question whether or not such action must be taken by ordinance, rather than by resolution. By the home rule charter, adopted in June, 1900, the commissioner of public works is a public officer, appointed for a term of three years, and he is required to subscribe an oath, and to give a bond for the faithful performance of his duties. He has general charge of the engineering work of the city, and is in control and supervision of its streets, bridges, public works, etc. The afore-mentioned resolution granted to the telephone company permission to place its poles, and string wires thereon, on Burns avenue, but upon the express condition that their location should be designated by the commissioner of public works, and their erection subject to his approval and acceptance. Conceding that the common council had power to designate the locality and the method of constructing the extension of the telephone system, without regard to the commissioner, and that appellant would have been warranted in directing the erection of the poles under such a resolution, yet in this instance the council did not take such action, but delegated to the commissioner the right of designation and supervision. The duties so imposed by resolution upon the commissioner were such as by virtue of his office he was compelled to assume and perform, and the reason assigned for his refusal in this instance was purely arbitrary and unjustified. But, regardless of this fact, appellant was not authorized in taking matters into his own hands, even though conforming to the recognized method of erecting such poles, and by so doing he violated the provisions of Ordinance No. 436. The legal course open to appellant in this

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matter was to compel the commissioner's action. Mandamus will lie to compel the exercise of official discretion or judgment, although it will not lie to direct the manner in which the duty shall be performed. *State v. Teal*, 72 Minn. 37, 74 N. W. 1024.

Counsel on both sides have conceded, for the purposes of this action, that the telephone company possessed the right to extend its system throughout the city, and that the only question here involved is the proper exercise of the city's police power of regulation.

Judgment affirmed.

NEBRASKA TELEPHONE CO. v. WESTERN INDEPENDENT LONG DISTANCE TELEPHONE CO. ET AL.

Nebraska; Supreme Court.

1. RIGHTS OF TELEGRAPH AND TELEPHONE COMPANIES IN CITY STREETS.—The term "public roads," in section 14, ch. 89a, Comp. St. 1901 of Nebraska, giving telegraph and telephone companies a right of way along the public roads of the State, does not include the streets and alleys of a municipal corporation, and the unauthorized use of such thoroughfares for such purpose constitutes a public nuisance. A court of equity will not lend its aid to protect a suitor in maintaining a public nuisance, nor in the doing of an act punishable under the laws of the State.

(Syllabus by the court.)

Commissioners' opinion. Department No. 3. Appeal by plaintiff from judgment for defendants.

W. W. Morsman and Matthew Gering, for appellant.

Byron Clark, for appellees.

Opinion by ALBERT, C.:

This is an action for relief by injunction. The petition, so far as is necessary to show the ground upon which the action is based, is as follows:

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"For more than fifteen years last past, this plaintiff has been, and now is, engaged in the prosecution of the telephone business in the State of Nebraska, operating exchanges and long distance lines, and during the said period has at all times been, and now is, in the actual possession and enjoyment, under the laws of the State of Nebraska, of a right of way upon one of the public roads of the State, upon and along which it maintains its poles, with cross-arms extending 2 1-2 feet on each side of the center of said poles, and which said cross-arms support plaintiff's wires, all for the transmission of communications by telephone between plaintiff's patrons, and which said public road passes through and constitutes the main public road or street, and is commonly known as 'Main Street,' in the village of Louisville, in the county of Cass, in the State of Nebraska.

"(2) The plaintiff's said poles are all set out on the same side of the said public road, where the same passes through the village aforesaid, and plaintiff's said poles and cross-arms support four wires used for long distance telephony. Plaintiff's poles are 25 feet high, and set at distances from each other of about 125 feet, and the wires thereon are carried upon insulators fixed to cross-arms aforesaid, separating the said wires by spaces of 12 inches.

"(3) The defendants are also engaged in the telephone business in the State of Nebraska, but have not heretofore occupied the public road aforesaid at the point where the same passes through the village of Louisville as aforesaid, but are now proposing to occupy the same by the erection of poles equipped with cross-arms, and by the stringing of wires thereon for long distance and exchange service. The said defendants give out that they will, and threaten to, and are now in the act of setting the said poles along the said public road, at the place where the same passes through the said village, in the line of plaintiff's poles and right of way, and threaten and are about to so set and erect their said poles so that they will extend above and through plaintiff's lead of wires, strung as aforesaid, and so that the said defendants' poles will be projected into and through the central 12-inch space between the wires of plaintiff's said lead. The defendants intend and threaten to place their wires on the poles of the said defendants, above plaintiff's lead of wires, and in line therewith, and to so maintain them upon cross-arms fixed to the defendants' said poles, extending at right angles with and across plaintiff's lead of wires.

"(4) The plaintiff has never given its consent to the erection of the poles, cross-arms and wires of the defendants, or any of them, in, upon, or over the right of way aforesaid of plaintiff, or in the line of plaintiff's poles, or within 2 1-2 feet from the said line on either side, or through or over plaintiff's lead of wires, but has expressly objected thereto; but the defendants, disregarding the plaintiff's objections and prior rights, are now proceeding to erect their poles, cross-arms and wires in the manner hereinbefore set forth, with the intent and for the purpose of injuring plaintiff, and interfering with its business and its prior rights.

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"(5) If the defendants erect and maintain their poles and wires as hereinbefore set forth, such erection and maintenance will immediately and greatly interfere with and injure plaintiff's business, and the business of the plaintiff's patrons, over said wires. The defendants' poles and plaintiff's wires will come into electrical contact, so that plaintiff's wires will be grounded, and thereby conversation over plaintiff's said wires will be interrupted and prevented; and defendants' wires will also, when loose or down, come into electrical contact with plaintiff's said wires, producing a like result, to great injury of the plaintiff, and for which injury plaintiff has no adequate remedy at law."

An answer was filed by the defendant, the Western Independent Long Distance Telephone Company and its officers, admitting that their intention and purpose was to do the acts sought to be restrained; denying that it was done with the intent and for the purpose of injuring the plaintiff; and, in effect, that such acts would not interfere with the plaintiff's business. The answer also put in issue the right of the plaintiff to occupy the street referred to in the petition. The other defendants failed to answer, and, from the evidence, it would appear that they were in no way concerned in the acts sought to be restrained. The court found for the defendants, and dismissed the complaint. The plaintiff brings the case here on appeal. In the further consideration of the case, we shall refer to the parties by the title in the District Court.

The first question that concerns us in this case is whether the plaintiff rightfully occupied the streets in question with its poles and wires. In the consideration of this question, the court will take judicial notice that the village of Louisville is, and for many years past has been, a body politic, organized under the general laws of the State. The plaintiff does not base its claim to a right of way on the streets on any grant from the village, but solely on section 14, ch. 89a, Comp. St. 1901, which is as follows: "That any telegraph or telephone company incorporated or doing business in this State shall be and is hereby granted the right of way along any of the public roads of the State for the erection of poles and wires; provided, that poles shall be set at least six feet within the boundary line of said roadway and not placed so as (to) interfere with road crossings; and, provided, that said wires shall be

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placed at the height of not less than twenty feet above all road crossings."

It is insisted on behalf of the plaintiff that the term "public roads," in the section just quoted, includes the streets and alleys of a municipal corporation. A statute of the State of Minnesota worded very much like the one under consideration was construed in *Abbott v. Duluth* (C. C.), 104 Fed. 833, and the term "public roads and highways" was held to include the streets and alleys of cities and villages, as well as rural highways. This construction was followed by the Supreme Court of that State in *Northwestern T. Co. v. Minneapolis*, 7 Am. Electl. Cas. 168, 81 Minn. 140 86 N. W. 69, 53 L. R. A. 175 (START, C. J., dissenting), and *Duluth v. Duluth Tel. Co.*, 8 Am. Electl. Cas. 136, 87 N. Y. 1127. A similar statute was construed by the Supreme Court of Iowa in *Chamberlain v. Iowa Tel. Co.*, 8 Am. Electl. Cas. 11, 93 N. W. 596, in which it was held that the term "public highways" includes the streets of a city. The cases just cited strongly support the theory of the plaintiff, but, after all, with this court, as with those whose opinions have been cited, the question is one of legislative intent; that is, did the Legislature use the term "public roads" in the most comprehensive sense, intending thereby to include the streets and alleys of municipal corporations, or did it use it in the more restricted sense, intending to include only rural highways? Ordinarily, in construing a statute, words should be given their usual and recognized meaning. *State v. Byrum*, 60 Neb. 384, 83 N. W. 207; *State ex rel. v. Weston*, 4 Neb. 216. It is only where such construction would be obviously repugnant to the intention of the lawmakers that a different construction is allowable. Whatever may be the usage in other jurisdictions, we think it is safe to say that in this State the term "public road" is commonly understood and recognized to apply exclusively to rural highways. It is thus understood and used by the people of the State generally, and it is doubtful whether, in the ordinary affairs of life and common conversation, it is ever used or understood to convey the idea of a street or alley of a city or village. This is a matter of common knowledge, and of which this court must take judicial notice.

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There is nothing in the act itself, nor in the legislative history of the State, that suggests that the Legislature used the term in any other sense than that in which it is commonly used by the people of the State. The statutes of this State were before the Legislature when the act was passed. In those relating to cities and villages the term "public road" never occurs, while in those relating to rural highways it is invariably used, save in some cases where the term "highway" is used as its equivalent. The statutes in force at that time vested county boards with the general supervision over "public roads" (sec. 1, ch. 78, Comp. St. 1885), and municipal authorities with the control of their streets and alleys (subd. 24, sec. 15, ch. 13, and sec. 77, ch. 14, id.). At that time cities, as an additional remedy against encroachments on their streets and alleys, had express authority to enact ordinances to prevent the use of such streets and alleys for the support of telegraph and telephone poles and wires. Subd. 8, sec. 15, ch. 13, Laws 1885, and subd. 21, sec. 39, ch. 14, Id. At the same session at which the act in question was passed, an act was passed for the incorporation of cities of the metropolitan class, and another for the incorporation of cities of the first class, conferring upon such cities the power to enact such ordinances (sec. 50, ch. 10, p. 123, Laws 1887, and subd. 14, sec. 68, ch. 11, p. 239, Id.), while the authority of cities of the second class in that behalf was left untouched. It seems to us that but one reasonable inference is to be drawn from the foregoing, and that is that the Legislature had in mind the popular distinction between "public roads" and "streets and alleys," and used the former term in the act under consideration in the sense in which it is generally used and understood by the people of this State, and not in its generic sense, as including the streets and alleys of municipal corporations, because it dealt with the latter in such a manner as to clearly indicate that it regarded them as something separate and distinct from the public roads of the State. Had it regarded a right of way for telegraph and telephone poles on the streets and alleys of municipal corporations of such transcendent importance to the public as to justify direct legislative action, and to make it the subject of a

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legislative grant, it is not probable it would at the same time have clothed such municipalities with express authority to defeat the grant. It follows, therefore, that the plaintiff's occupancy of the street in question was without lawful authority. But the plaintiff contends that the State, or the village, alone can successfully assail its right to the use of the street as a right of way. In support of this contention we are cited to *Williams v. Citizens' R. R. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201. We do not consider that case in point. There the plaintiff was a street railway company, and had organized for the purpose of constructing and operating an electric street railway, under a statute providing for the organization of street railway companies, and authorizing them to employ any kind of motive power in common use, except steam. The question raised by the defendant was that by the use of electricity as a motive power the plaintiff was acting without scope of its charter. Passing on the question thus raised, the court applied the rule that, where there is an assumption of corporate rights and functions and an exercise thereof under color of law, only the State can question the validity of the assumption and the exercise of such functions and rights. That is only another way of stating the elementary rule, applicable to corporations generally, that where an association of persons is found in the exercise of corporate franchises, under color of legal organization, its existence as a corporation cannot be inquired into in a collateral proceeding, and generally it can be inquired into only by the State whose sovereign powers have been usurped. That is not the question before us. The unauthorized obstruction of a public thoroughfare was a nuisance at common law, and is punishable as such under our statutes. Sec. 232, Cr. Code. The case, then, is one in which the plaintiff invokes the extraordinary powers of a court of equity to protect it in maintaining a public nuisance, and in the doing of an act punishable under the laws of the State. We know of no instance wherein a court of equity has lent its aid to such ends. To do so would be contrary to those principles which have always guided such courts in the exercise of their powers.

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It follows that the complaint was properly dismissed, and we therefore recommend that the decree of the District Court be affirmed.

AMES and DUFFIE, CC., concur.

Per CURIAM:

For the reasons stated in the foregoing opinion, the decree of the District Court is affirmed.

MAHAN V. MICHIGAN TELEPHONE CO.

Michigan; Supreme Court.

1. **ORDINANCE GRANTING FRANCHISE TO TELEPHONE COMPANY; CONTRACTUAL OBLIGATIONS.**—An ordinance granting to a telephone company the right to construct its lines and operate its system of telephones in the streets and public places of a city, and providing that if such franchise be transferred the company acquiring the same shall be subject to the terms and conditions of the ordinance, and the acceptance of such ordinance by the company, creates a contractual relationship between the city and such company.
2. **OBLIGATIONS OF TRANSFEREE OF FRANCHISE.**—A company purchasing the franchise granted by such an ordinance is bound by its terms and conditions, and becomes fixed with the duties and obligations of the original grantee. Such transferee company will be deemed to have purchased such franchise with full knowledge of the conditions attached.
3. **RIGHTS OF SUBSCRIBERS UPON TRANSFER.**—The permitting of access to its service to the subscribers of the original company by the purchasing company for a time will imply a construction of the ordinance upon the part of the latter company, to the effect that it was bound thereby to furnish such service to the subscribers of the original company, which construction cannot afterwards be repudiated; such subscribers may enforce their rights against the purchasing company by mandamus.

Certiorari by defendant to review judgment awarding writ of mandamus against it. Decided February 17, 1903.

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W. E. Thompson (Wells, Angell, Boynton & McMillan, and D. F. Morgan, of Counsel), for appellants.

James H. Pound, for relator.

Opinion by MONTGOMERY, J.:

The opinion of the circuit judges, prepared by Judge Brooke, states the issues and discusses the points involved in this case so clearly that we quote it at length:

"This is a petition by the relator against the respondent, the Michigan Telephone Company, for a writ of mandamus to compel said respondent to give petitioner access to the subscribers to the telephone system owned and operated by the Michigan Telephone Company in the city of Detroit. The facts of the case may be briefly stated as follows: For some years prior to the 14th day of March, 1896, the respondent, the Michigan Telephone Company, had owned and operated in the city of Detroit a telephone exchange. Upon the said 14th day of March, 1896, the respondent, the Detroit Telephone Company, secured a franchise from the city of Detroit, and said franchise was on said date accepted by said respondent, the Detroit Telephone Company. Under said franchise the respondent, the Detroit Telephone Company, proceeded to install a telephone exchange in the city of Detroit, and secured, from time to time, subscribers, so that at the time the contract was entered into with the relator by the respondent, the Detroit Telephone Company, there were upwards of five thousand subscribers to said system. The petitioner, Mahan, had a contract with the respondent, the Detroit Telephone Company, running for a period of five years, and bearing date the 25th day of August, 1899, which had not expired, by about two years, at the time the acts complained of were committed by the respondents. On the 6th of April, 1900, the respondent, the Detroit Telephone Company, executed a bill of sale whereby, for a valuable consideration, it transferred to the respondent, the Michigan Telephone Company, all of its tangible property, including some 5,200 telephones, and also including all rights under said franchise from the city of Detroit, of March 14, 1896. Soon thereafter the purchasing company, the Michigan Telephone Company, caused the two exchanges to be connected; and from time to time up to the 1st day of Dec., 1901, subscribers to either system were given access, not alone to the system to which they subscribed, but to all subscribers of the other system. On or about the 1st day of December, 1901, the Michigan Telephone Company notified all subscribers of the Detroit Telephone Exchange that after that date connection with the Michigan Telephone Company's subscribers could not be had, and since that time the Michigan Company has refused to furnish to the Detroit Telephone subscribers connection with the Michigan Company's subscribers. Demand has been made by the relator upon the Michigan

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Company for such connection, and has been refused. During the period between April 6, 1900, when the number of telephones in use by the Detroit Telephone Company was over 5,000, and the 1st day of December, 1901, when the number in use by the patrons of that company was reduced to something like 300, agents of the Michigan Telephone Company endeavored to induce users of the Detroit Telephone to discontinue the same and use only the Michigan Telephone. At the time the petition was filed in this case the Detroit Telephone users had become further diminished to about 90, and, at the time the argument was heard, it had been further reduced, as was asserted by counsel for petitioner, which statement was unchallenged by counsel for either respondent, to about 21.

"Two questions are raised by the pleadings in this case, which have already been determined, viz.: (1) The propriety of the remedy; and (2) the reasonableness of the rate charged by the respondent, the Michigan Company. As to the first question, this court has already determined that the rates charged by the Michigan Company are not fairly in issue in this proceeding. The sole question, therefore, remaining for determination, is whether or not the petitioner is entitled, under the pleadings and proofs, to the writ of mandamus to compel the respondent, the Michigan Company, to give him—a subscriber to the Detroit Telephone Exchange—access to the subscribers of the Michigan Telephone Company in the city of Detroit. Section 14 of the ordinance of March 14, 1896, running to the Detroit Telephone Company, is as follows: 'If the said company shall at any time during the term of this franchise transfer its rights to any other telephone company now operating in Detroit, or make any consolidation with such company, the company acquiring such rights or the consolidated company shall be subject to the terms and conditions of this ordinance, and shall operate its lines under this ordinance.' Section 15 of said ordinance is as follows: 'All the rights, liabilities and obligations herein granted or imposed upon said company shall apply to and be operated in favor of or against any assignee or successor of said company.' The above-named respondents, the Michigan Telephone Company and the Detroit Telephone Company, are organized under the provisions of chapter 177 of the Compiled Laws (vol. 2, p. 2116), section 4 of which act provides the manner in which telephone companies may operate within the State of Michigan. Counsel for respondents claim that sections 14 and 15 of the ordinance were never binding upon the respondent, the Detroit Telephone Company, and cite in support of their contention *Michigan Telephone Company v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520. In that case the complainant's assignor, the Telephone & Telegraph Construction Company, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate a telephone system in said village. The permission was duly granted by the village, and the company proceeded, at large expense, to erect poles and stretch wires within the lines of the streets and alleys in said village until June 5, 1891, when the village became incorporated as a city. The complainant in that case, being the respondent,

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the Michigan Telephone Company, in this case, duly acquired by purchase all the property, rights and privileges of said construction company, and continued to do business in said city until August 3, 1897, when it erected, in a good and workmanlike manner, and in accordance with the terms of the statute under which it was organized, certain poles in said city, for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service. On said August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them, which he did. On August 10 and 16, 1897, the complainant presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused permission. Under these facts, in an opinion by Justice GRANT, it was held that it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to establish reasonable rules and regulations for the erection of poles and the stretching of wires. The other case cited by respondent's counsel is the case of *The Michigan Telephone Company v. City of Benton Harbor*, 7 Am. Electl. Cas. 9, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104, and it only differs from the case last cited in that the assignor of the complainant never had permission granted to it to erect its poles or string its wires in the city; and in that case it was held, as in the case last cited, that the common council of the defendant city should provide, by ordinance or otherwise, reasonable regulations for the erection of the poles and stretching of the wires of the complainant. In the case first cited (*Michigan Telephone Company v. City of St. Joseph*) the following language occurs in the opinion of Justice GRANT: 'It is urged that the permission granted to the Telephone & Telegraph Construction Company was personal to that company, and could not be alienated without the consent of the city. That company was organized under the general laws of the State, and derived its powers and obligations from that law. The only power which a city could have exercised over it was that of regulation.' Under the principles laid down in the decisions just cited, it is quite apparent that had the Detroit Telephone Company applied to the common council of the city of Detroit to fix, by ordinance or otherwise, reasonable rules and regulations under which it might proceed, by virtue of the power granted in the act under which it was organized, to erect its poles, string its wires, and establish a telephone exchange in the city of Detroit, the court would have compelled compliance with the demand. That, it seems to us, is all that the cases in question determine. But can it be said that, because the Detroit Telephone Company had the right to insist upon the city of Detroit making reasonable rules and regulations under which it should establish and operate its telephone exchange in the city of Detroit, it was thereby precluded from entering into contractual relations with the city of Detroit touching the terms and conditions under which it should erect and operate its said exchange? It seems to us obvious that this cannot be so. The right of the city to make the contract in the premises cannot be questioned. Neither can it be questioned that the Detroit

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Telephone Company had the right, as well as the power, to make a contract with reference to the erection, maintenance and operation of its exchange. An examination of the ordinance in question discloses the fact that in section 1 of said ordinance the right is given by the city to the respondent, the Detroit Construction Company, to lease, to any other company having similar rights to itself, the right to use poles and conduits of the respondent, the Detroit Construction Company. This is clearly a concession, and presumably a valuable one, to the grantee in the franchise, and is clearly outside any rights which it could claim under the authority of the general law which it now invokes. Upon the day of the passage of said ordinance, the respondent, the Detroit Construction Company, accepted said ordinance in the following terms: 'Detroit, March 19, 1896. To the Mayor and Common Council: The Detroit Telephone Construction Company accepts the ordinance granted to said company, approved March 14, 1896. The Detroit Telephone Construction Company, by Charles Flowers, Vice-President. By order of the board of directors.' The passage of said ordinance by the common council, its approval by the mayor of the city of Detroit, and its acceptance by the company, constitute, in our opinion, a binding contract between the company or its assigns and the city of Detroit. The company acted under the ordinance, and installed its exchange thereunder, and the citizens of the city of Detroit, to a large number, became subscribers thereto; and we do not understand it is claimed that the respondent, the Detroit Telephone Company, could have at any time itself repudiated any of the terms of the ordinance under which it did business for several years.

"The sole question remaining for determination, therefore, is, did the respondent, the Michigan Telephone Company, by its act in acquiring by the bill of sale all the tangible property of the Detroit Telephone Company, as well as all its rights under the franchise in question, coupled with its action thereafter, become fixed with the duties and obligations with which the Detroit Telephone Company was charged under said franchise? We think it did. The respondent, the Michigan Telephone Company must be held to have entered into the purchase with full knowledge and notice of the franchise in question, and all the conditions and obligations assumed by its grantor thereunder, and it cannot now enjoy the benefits thereof without also assuming the obligations incident thereto. Strength is added to this view by the action of the respondent, the Michigan Telephone Company, immediately after said purchase, as tending to show what construction it itself placed upon said franchise and the obligations incident thereto. Immediately after the purchase by it of the tangible assets of the Detroit Company and its franchise rights, access was given by it to the subscribers of the Detroit Telephone Exchange to the subscribers to the Michigan exchange. Users of the Detroit Telephone Company accepted this service and paid for the same for a period of something like a year and a half. We are of the opinion that the furnishing of the service by the respondent, the Michigan Company, and the acceptance thereof by the subscribers to the Detroit Company, if it did not constitute a new implied contract between the Michigan Company and

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said subscribers, at least furnishes a construction of the terms of the ordinance by the parties themselves which the respondent, the Michigan Telephone Company, is not now at liberty to repudiate."

We are satisfied with the reasoning of the foregoing opinion, and adopt it.

It is contended in this court that mandamus is not a proper remedy, but we agree with the learned circuit judges that that remedy is open. Merrill on Mandamus, sec. 162.

The order will be affirmed.

LONG, J., did not sit. The other justices concurred.

As to contractual obligations imposed by an ordinance granting a franchise to a telephone company, see note to *Morristown, City of, v. East Tennessee Teleph. Co.*, ante, p. 3, and monographic note, "Use of Streets and Highways by Telegraph and Telephone Companies," post, p. 159.

Assignability of franchise.—It has been maintained that the grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee, and cannot be alienated except by consent of the granting power; and that therefore a telegraph or telephone company has no power, in the absence of special authority, to alienate the privileges granted to it by a State government, and an agreement so to do is *ultra vires* and void. 25 Am. & Eng. Ency. of Law, 751, citing *United States v. West. Un. Teleg. Co.*, 50 Fed. 28; *West. Un. Teleg. Co. v. Union Pac. Ry. Co.*, 3 Fed. 721. And in *Croswell on Electricity*, § 158, it is said that "a grant to a telephone, telegraph, electric light, or railway company of the power to use the streets, highways and post roads for the stringing of its wires and the setting of its poles contains so much of an element of personal obligation, that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject." In Michigan the courts have dissented from this proposition and have upheld transfers of franchises for the use of public streets and highways by public service corporations. *Michigan Teleph. Co. v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383; see, also, *People ex rel. City of Pontiac v. Central Union Teleph. Co.*, 8 Am. Electl. Cas. —, 192 Ill. 307, 61 N. E. 428. As to power of electric light company to mortgage its franchise, see *American Loan & Trust Co. v. General Electric Co.*, 8 Am. Electl. Cas. 117, 61 Atl. 660.

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ELECTRIC LIGHT FRANCHISES; BOND OF GRANTEE.

SALEM, CITY OF, v. ANSON ET AL.*Oregon; Supreme Court.*

1. **ELECTRIC LIGHT FRANCHISE; BOND TO SECURE COMPLETION.**—Under a statute delegating to a municipality the power to grant the use of its streets to a corporation for the purpose of supplying the municipality and its inhabitants with electric light, upon such terms and conditions as may be prescribed, the governing body of such municipality may require a bond of the grantee of such privilege, conditioned for the completion of the work within a specified time.
2. **LIQUIDATED DAMAGES.**—The sum specified in such bond as a penalty may be considered as liquidated damages, and may be recovered as such.

Appeal by plaintiff from judgment for defendants. Decided January 13, 1902; reported 40 Or. 339, 67 Pac. 190.

W. H. Holmes, for appellant.

G. G. Bingham, for respondents.

Opinion by BEAN, C. J.:

The first question is as to the right of the city to take and receive the bond upon which this action was brought. The charter of Salem declares that the common council shall have exclusive power to "contract for water and lights for city purposes, or to lease, purchase, or construct a plant or plants for water or lights, or both, for city purposes, in or outside the city limits; provided, that the council, upon making a careful and accurate estimate of building or purchasing and running such plant or plants, finds that the same may be constructed or purchased and run at a much less expense to the city than can be contracted for with private parties. The expense for building or purchasing such plant or plants cannot be entered into except by two-thirds vote of all the legal voters voting at any general election, or at a special election called by the

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council for such purpose, by a two-thirds vote to incur such expense, the council may enter into a contract; provided, that the council may grant and allow the use of streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe" (Sess. Laws 1899, p. 924, sec. 6, subd. 6); and "to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, . . . electric light or other purposes, . . . upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers, and the erection of gas or other lights; to preserve the streets, alleys, side and crosswalks, bridges and public grounds from injury, and prevent the lawful use of the same, and to regulate their use." (Id., p. 927, sec. 6, subd. 26.) The legislature has thus delegated to the city the power of regulating and controlling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of the general statutes of the State. (Tied. Mun. Corp. sec. 289.) The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of the judicial power, so long as it is within proper constitutional limitations. It may be exercised directly by the legislature, or be delegated by that body to a municipal corporation; and, when so delegated, the municipality has, within the authority granted, the same rights and powers that the legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of

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which has no limit, so long as it is within the objects and trusts for which the power was conferred. It is admitted that the legislature may, by virtue of its paramount authority, require bonds or undertakings of the grantees of such privileges, conditioned that they will construct their works within a specified time, or that they will otherwise comply with the terms of their grant, and a municipal corporation to which the exclusive power over the subject has been delegated may exercise the same right. There is no express provision in the charter of Salem authorizing the council, upon granting the privilege to use the streets, to require that the work shall be done within a specified time; nor is it necessary. It is given the exclusive power to make the grant "upon such terms and conditions" as it may prescribe, which necessarily authorizes it to impose such reasonable conditions precedent or subsequent to the granting or exercise of the franchise as may be deemed necessary or proper, including a requirement that the grantee shall give a bond, conditioned as the one in suit. *City of Indianola v. Gulf, W. T. & P. Ry.*, 56 Tex. 594. In *City of Aberdeen v. Honey*, 8 Wash. 251, 35 Pac. 1097, the power of the municipality was limited by the terms of its charter, and the court held that, by reason of such limitation, it did not have the authority to exact a bond from the grantee of a franchise for a street railway. Hence that case is not authority here. We are of the opinion, therefore, that the bond in suit was valid, and within the power of the city to require and accept.

The remaining question is as to whether the sum specified in the bond is to be regarded as a penalty, or as liquidated damages. It is often difficult to determine whether a sum stipulated in a contract to be paid on breach thereof shall be considered as liquidated damages or as a penalty, and there is a wide divergence of opinion in the adjudged cases on the subject. The object is, of course, to ascertain the intention of the parties, as nearly as possible, and to enforce the contract according to their agreement. [Omitting general discussion as to liquidated damages.] . . .

The damages to the city, if any, from Anson's failure to build his plant within the specified time, were necessarily speculative and

uncertain, if not absolutely incapable of proof. Indeed, it is quite doubtful whether the city could have been damaged in any way by such failure. It could gain nothing in its political or sovereign capacity by the construction of the plant, and could lose nothing by its nonconstruction. The damages resulting from the loss of the promised share of the gross income of the proposed plant and the right of purchase are not covered by the bond, and, moreover, are so speculative, uncertain, and dependent upon so many contingencies, that they can scarcely be regarded as a subject of judicial investigation. But whatever the rule might be as between private individuals, this action is not to be determined wholly by the principles applicable to contracts of that kind. The sum specified in the bond is somewhat in the nature of a statutory penalty for the nonperformance of a duty enjoined by law. The ordinance granting to Anson the right and privilege to use the streets and highways of the city in the construction and maintenance of his plant had the force and effect of a statute, and by his acceptance of its provisions he became bound to comply with its terms as a statutory duty. The bond in question was given as security for the performance of such duty, and the sum specified therein is in the nature of a penalty, to be imposed as a punishment for disobeying or disregarding the provisions of the ordinance. *Maryland v. Baltimore & O. R. Co.*, 3 How. 534, 11 L. Ed. 714. The case of *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, is very similar to the one in hand. The legislature of Rhode Island passed an act authorizing the Boston, Hartford & Erie Railroad Company to locate and construct a railroad through the State, but the act was not to go into effect unless the railroad company should, within 90 days from the adjournment of the legislature, deposit in the office of the treasurer its bond, with sureties satisfactory to the governor, in the sum of \$100,000, that it would complete the road before the 1st day of January, 1872. In compliance with this statute, the railroad company made, executed and filed in the office of the treasurer an ordinary penal bond in the sum stated, conditioned as in the act required. It failed to build the road, and, in a suit to enjoin the treasurer from

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receiving or collecting the sum specified in the bond, it was contended, as here, that the obligation required by the statute and given by the company was an ordinary penal bond, upon which no recovery could be had except for the damages the State actually sustained from the breach of its conditions, and, it being admitted that no damages had resulted, the money arising from the payment of a certificate of indebtedness pledged in lieu of sureties on the bond reverted to the plaintiff. This position was sustained by the trial court, but on appeal the decree was reversed, and it was held that the State was entitled to collect the full amount of the bond, notwithstanding it was admitted that it had not been damaged by the breach thereof. The judgment is based upon two principal considerations: (1), That it was not, and could not have been, intended by the parties that the bond was a mere indemnifying bond; and (2), that the sum mentioned therein was imposed by the State as a statutory penalty for the nonperformance of a statutory duty. After pointing out that no damage could possibly have arisen to the State in its sovereign or political capacity by the failure of the railroad company to construct its road as provided in the statute, Mr. Justice Matthews, speaking for the court, said:

"The question of damages and compensation was not, because it could not have been, in contemplation of the parties. There was no room for supposing that there could be any. To assume that the statute required this bond and security in this sense, in full view of the legal conclusion which it is said necessarily flows from its form, and that in the event contemplated, of the failure to build the road, all that remained to be done was that the State should hand back canceled the obligation and security it had been at such pains to exact, is to put upon the transaction an interpretation altogether inadmissible. It would have been, upon such an assumption, a vain and senseless thing, and, however private persons may be sometimes supposed to act improvidently, we are not to put such constructions, when it is legally possible to avoid them, upon the deliberate and solemn acts and transactions of a sovereign power, acting through the forms of legislation. The conclusion, in our opinion, cannot be resisted that the intention of the parties in the transaction in question was that, if the railroad should not be built within the time limited, the corporation should pay to the State, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. The supposition is not open that the penalty was prescribed merely *in terrorem*, to secure punctuality in performance, with the

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reserved intention of permitting subsequent performance to condone the default, for a distinct section of the statute . . . declares that, in case of failure to complete the road within the time limited, the act itself should be void and of no effect."

In *Nilson v. Town of Jonesboro*, 57 Ark. 168, 20 S. W. 1093, the city granted to Nilson the right to construct a street railway over and through the streets of the city, and took from him a bond in the sum of \$500, conditioned for the faithful performance by him of the provisions of the ordinance. In an action to recover on the bond because of his failure to construct the railway within the time specified, the single question presented was whether the sum mentioned in the bond should be treated as a penalty or as liquidated damages, and, after a careful examination of the authorities, it was held that plaintiff was entitled to recover the amount specified, without proof of actual damages, and notwithstanding it appeared that the damages were in fact capable of assessment. In *City of Indianola v. Gulf, W. T. & P. Ry.*, 56 Tex. 594, the city of Indianola granted a railway company the right to construct its road through one of the streets of the city, on the condition that it should extend it to a point 65 miles distant within a certain definite time, and exacted a bond in the sum of \$50,000, conditioned for the faithful performance of the grant on its part. The company failed to construct the road, and in a suit on the bond it was held that the sum stated therein was stipulated damages, and that the city could recover the full amount thereof without proof of actual damages. It is true that in that case, as also in *Nilson v. Town of Jonesboro*, *supra*, the term "liquidated damages" was used in the contract. But the decisions did not turn upon that fact, but were principally controlled by the consideration that no accurate computation of the real damages could be made.

Within the doctrine of these cases—and they seem to be sound—the demurrer to the complaint should have been overruled. The judgment of the court below must therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

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USE OF ELECTRIC CONDUITS.

BOSTON ELECTRIC LIGHT COMPANY v. BOSTON TERMINAL CO.

Massachusetts; Supreme Judicial Court.

1. **RIGHT OF ELECTRIC LIGHT COMPANY TO USE OF STREETS FOR ITS CONDUITS.—**

The plaintiff, an electric light corporation, incorporated under the general laws, was authorized to lay wires under the streets of the city of Boston, subject to the condition that it should remove its conduits whenever directed so to do by the city council. Notwithstanding this condition, it was contended by the electric light company that it had acquired a right of property in the street which could not be appropriated to another public use without compensation, and that, therefore, statute 1896, chapter 516, authorizing the defendant to acquire portions of two public streets in which the plaintiff had constructed its conduits as a part of the site of the terminal station, erected under the authority of such statute, was unconstitutional. Statute 1894, chapter 454, provided for the gradual removal of all wires and electrical appliances, and gave to those operating such wires the option to remove them or to put them under ground in conduits to be constructed under regulations. It was held that the option given by such statute to place such wires under ground did not confer upon the users an absolute franchise in the street independent of the original grant, which, by its terms, was revokable at the pleasure of the city council. The rights possessed by the electric light company under its franchise are not absolute, but revokable, and the reservation of such right of revocation contained in the ordinance granting the franchise was properly exercised by the Legislature.

Exception by plaintiff from judgment for defendant. Decided January 7, 1904; reported 67 N. E. 346.

Everett W. Burdett and Chas. A. Snow, for plaintiff.

Samuel Hoar and Woodward Hudson, for defendant.

Opinion by KNOWLTON, C. J.:

This is an action of tort to recover the value of conduits laid by the plaintiff in portions of two public streets in Boston, which were discontinued by St. 1896, p. 520, ch. 516, and taken by the

defendant for a part of the site of the terminal station erected under the authority of this statute. The plaintiff brought a petition for damages for the taking of these conduits, which was before this court, and is reported in 182 Mass. 397, 65 N. E. 835. In that case it was decided that no part of the petitioner's property was taken, and, after a consideration of the uses to which public streets may be put in this commonwealth, and the rights of parties using them, under our general laws, the opinion proceeds as follows: "All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in public streets, and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights." The statutes and ordinances relied on were then cited. The plaintiff now attacks the constitutionality of St. 1896, p. 520, ch. 516, and seeks to bring this action within that class of cases in which a statute has been held to confer upon a corporation a franchise, which includes a private right of property in streets and public places, that is protected by the Constitution of the United States under the contract created by action of the corporation under the statute. In view of the plaintiff's contention, it may be well to consider more particularly the authority under which these conduits were laid. The plaintiff was incorporated under the general laws contained in Pub. St. 1882, ch. 106, for the purpose of conducting the business of manufacturing, generating, transmitting, and supplying electricity to be used in lighting in the city of Boston. This statute authorizes the organization of corporations for carrying on business of many different kinds, but it contains no special mention of business of this kind, and does not purport to give any authority to use the public streets. Most of the poles formerly used by the plaintiff on the streets referred to were erected by its predecessors in title—those in Kneeland street by the Brush Electric Lighting Company, and

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those in Federal street by the American Union Telegraph Company; which corporations, as we infer from the bill of exceptions, were organized under the same statute as the plaintiff. In reference to the erection of poles by each of these corporations the mayor and aldermen of Boston passed an order giving permission to erect the poles in the streets upon numerous stated conditions, one of which was that the company "shall remove said poles when so directed by said board" (of aldermen). Another was as follows: "Also on condition that if any of the above conditions are not complied with, the board of aldermen may remove said poles at the expense of said company." Ordinances were passed from time to time in regard to regulation and control of rights in the public streets, none of which purported to give to the plaintiff or to any similar company any rights which were not subject to control or termination at any time by the board of aldermen or the city council. The ordinance of 1885 (chapter 28), as amended by the ordinance of March 24, 1886, contains provisions as follows: "Telegraph, telephone and electric light companies, whether chartered by this or any other State, may lay wires under the streets of the city under the following regulations and not otherwise: . . . Second, that said company shall remove its conduits whenever directed so to do by the city council." It is therefore too plain for discussion that at the time of the passage of St. 1894, p. 516, ch. 454, the plaintiff was using the streets of Boston for the support of its poles and wires under a license revocable at any time by the public authorities.

This statute provided for a gradual removal, under the direction of an officer called a "commissioner of wires," of all the wires and electrical appliances, with certain exceptions, in the public streets of a specified portion of the city of Boston, which included Federal street and Kneeland street. It applied to all owners or users of wires, cables, and conductors within this specified portion, and included in terms every "person, firm, or corporation operating or intending to operate wires, cables, or conductors in said section of said city." It gave to those then operating such wires the option to remove them without replacing them elsewhere, or

to put them underground in conduits to be constructed under regulations. It was made the duty of the superintendent of streets "to issue, subject to the usual conditions, all permits for opening and occupying the streets of said city, necessary to carry out the intent of this act, upon application of said commissioner." The usual conditions of permits were prescribed by the ordinances then in force. Ordinances bearing upon this subject are the Revised Ordinances of 1892, ch. 3, sec. 21; *Id.* ch. 36, secs. 8, 14, 16; and the ordinance of 1885 (chapter 28), as amended by the ordinance of March 24, 1886. The revised regulations of the board of aldermen of 1892 (chapter 5, section 1) leave the issuing of permits subject to existing ordinances as to terms, specifications, and conditions, and do not change the conditions affecting this case. Section 14 of chapter 36 of the Ordinances of 1892 deals particularly with permits to open and occupy portions of the streets for the purpose of laying, maintaining, and using "wires, pipes, or conduits under the surface thereof," and prescribes as one of the conditions that the person applying for the permit "shall remove the conduits and wires whenever directed . . . so to do by the city council." Other ordinances then existing also provided that such conduits might be laid only upon condition that they should be removed at any time when directed by the city council. The petitioner laid its conduits under a permit containing this condition. It now contends that it acquired a right of property in the street, such that the street could not be discontinued and appropriated to another public use without giving it compensation.

Under the charter of the city of Boston the control and management of the rights of the public in the streets and highways were vested in the mayor and aldermen and the city council. It has been the policy of these bodies to retain this control, and not to permit the acquisition of private rights in the public easement by individuals or corporations. Under our system of laws the fee remains in the original owner or his successors in title, and the land may be used by him in any way that is not inconsistent with the rights of the public under the easement acquired by them

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when the street was laid out. Upon a discontinuance the easement is terminated, and the entire estate reverts to the owner of the fee. It seems pretty plain that by St. 1894, p. 516, ch. 454, the Legislature did not intend to create private rights which should interfere with the power of the public authorities at any time to discontinue a street, or with the right of the owner of the fee, on the termination of the easement, to have his property unincumbered by any subsequently created interest. It cannot be supposed that every "person, firm, or corporation" who elected to put wires underground rather than to remove them was given a franchise which included an individual right of property in the public easement that previously had been taken from the landowner. Rather the meaning of the statute seems to be, that persons, firms, and corporations who were then using streets for the maintenance of poles or wires under a revocable license should remove them, and should be permitted, if they chose, to put them underground under a like revocable license. For years the ordinances had allowed conduits to be put underground only by virtue of such a revocable license, and St. 1894, p. 516, ch. 454, only authorized this under permits containing the usual conditions. This construction of the statute is in accordance with the general policy of our law in regard to this easement of the public. The locations of our street railways in public streets are subject to revocation. Rev. Laws, ch. 112, sec. 32. The construction of gas mains in a highway or street gives no right excepting a right to use the highway or street while it is a highway or street, and does not prevent the public authorities from altering or discontinuing it without a liability in damages. Id., ch. 121, sec. 17; *Natick Gas Light Company v. Natick*, 175 Mass. 246-252, 56 N. E. 292. Under the statute just cited the erection and maintenance of gas pipes or poles and wires for lighting by electricity are subject to the direction and control of the mayor and aldermen or the selectmen. Though private corporations have sometimes been granted franchises by special acts of the Legislature, which give them permanent rights of property in public streets, the provisions of these laws are not applicable to the plaintiff in this action.

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The contention that the right of revocation reserved by the ordinances and the permit to the city council cannot be exercised by the Legislature is without foundation. The Legislature is the supreme authority in regard to public rights in the streets and highways. This reservation of a right of revocation was a limitation of the plaintiff's right to continue its peculiar use of the street as one of the public by the maintenance of a conduit, and it was a part of the regulation of the rights of all the public. The reservation to the city council was to that body as a representative of the public, and not to it in a narrow or individual sense. The Legislature could at any time supersede the city council in the exercise of its powers, and could do anything that ought to be done in regard to this public easement. The important fact is that the plaintiff had been given no right which was not subject to the control of this easement by the proper authorities. See *City of Richmond v. Southern Bell Telephone Company*, 85 Fed. 19, 28 C. C. A. 659; *Southern Bell Telephone Company v. Richmond*, 7 Am. Electl. Cas. 83, 103 Fed. 34, 44 C. C. A. 147.

The cases cited by the plaintiff in regard to legislative franchises which include rights of property in public places are not applicable to this case.

Exceptions overruled.

PURNELL V. McLANE, MAYOR OF BALTIMORE CITY, ET AL.

Maryland; Court of Appeals.

1. **USE OF ELECTRICAL CONDUITS CONSTRUCTED BY MUNICIPALITY; GRANT OF FRANCHISE.**—The defendants constituted the electrical commission of Baltimore city, vested with power to construct, maintain and regulate electrical conduits in such city, and were authorized and directed to rent space in such conduits to any applicant complying with the conditions prescribed by the ordinance creating the commission, and with such further conditions as should be specified thereby. The plaintiff applied for a permit to introduce his electrical wires in said conduits. The

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plaintiff was not incorporated and did not maintain overhead wires in the city at the time the ordinance creating the commission was passed. The commission denied his application because of his failure to comply with all the conditions of the ordinance, and for the further reason that he had no franchise or right to use any of the streets of the city for his wires.

The right to produce and sell electricity as a commercial product without legislative authority was conceded. It was also conceded that the use of the city streets for delivering electricity to a consumer is a franchise, and that the appellant could not make such use of the streets without the permission of the city or municipal government acting under legislative authority.

It was contended by the appellant that the ordinance above referred to contains a clear grant of the right to use the conduits constructed by the city upon the payment of the rental established by the commission, and that under such ordinance and section 8 of the city charter, delegating to the mayor and city council the power to grant specific franchises or rights in the highways and streets of the city, the appellant was presumptively entitled to a franchise. The section of the charter referred to and the ordinance were construed by the court, and it was held that the appellant was not entitled to a permit for the use of such electrical conduits unless he had first acquired a franchise for the use of the highways and streets of the city.

Appeal by plaintiff from an order refusing a right of mandamus. Reported 56 Atl. 830; decided January 22, 1904.

Joseph C. France and George R. Willis, for appellant.

W. Cabell Bruce, for appellees.

Opinion by PEARCE, J.:

This is an application for a mandamus. The purpose for which the writ is sought is to compel Robert M. McLane, mayor of Baltimore City, Harry F. Hooper, city register, and A. Roszel Cathcart, president of the board of fire commissioners, constituting the electrical commission of Baltimore City, to issue to the petitioner a permit authorizing him to use a duct in the conduits of said city on Sharp street, from Lombard to Pratt. The petitioner alleges that he is engaged in selling and furnishing electricity to the public, and that, other than himself, there is no person engaged in the business of manufacturing electricity exclusively for sale in Balti-

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more City, except a corporation known as the United Electric Light & Power Company; that all wires used in transmitting electricity must, under the law, be placed in conduits belonging to said city, and laid under its streets, lanes and alleys; that such conduits have been provided by the city under authority conferred upon it by chapter 200, page 276, of 1892, and by chapter 123, page 241, of 1898, known as the "New Charter," and codified as article 4 of the Code of Public Local Laws of Maryland; that in accordance with the power so conferred the mayor and city council enacted ordinance No. 107, establishing an electrical commission, and providing for the construction, maintenance and regulation of said conduits; that by section 11 of said ordinance said commission is authorized and directed to rent space in said conduits to any applicant, who shall comply with the conditions prescribed by said ordinance, and such further conditions as should be specified thereby; that on November 10, 1902, he applied to the electrical commission for space in said conduits from the premises where his plant is established to the manhole at the corner of Baltimore and Sharp streets; that the necessary permit was granted, and that, having complied with all the conditions of law, he introduced his wires in said conduits, and has been ever since engaged in prosecuting his said business; that on August 4, 1903, desiring to extend his business, he applied to said commission for additional space, as above stated, offering to pay the rental established, and to perform and abide by all the conditions that have been or may be by law established for the use of said conduits, but that his application has been opposed by the United Electric Light & Power Company, and the permit has been refused, solely, as he understands, on the ground that, not being a corporation, and not having maintained overhead wires in said city at the time of the passage of Ordinance No. 107, he is not entitled, without special legislative or municipal authority, to rent space in the city conduits.

The defendants answered, admitting the allegations of the petition, except that, first, they deny that he complied with all the conditions of law before introducing his wires into the conduits

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under his first application, and they allege that the then electrical commission inadvertently and improvidently granted the permit; second, they deny that he has offered, in connection with his second application, to comply with all the conditions of law; and, third, they aver, in explanation of their denials, that he failed to comply with all the conditions of law, in that he has never obtained, either from the General Assembly of Maryland or from the mayor and city council of Baltimore, pursuant to sections 7, 8, 9, 10, 11 and 37 of the new charter, in any lawful manner, the franchise or right to use any of the streets, lanes or alleys of said city for his wires. To this answer the petitioner demurred. The demurrer was overruled, and, the petitioner standing on his demurrer, the mandamus was denied, and the petition was dismissed.

The precise point raised by the appeal is thus stated in the appellant's brief: "Can the commission rent conduit space only to such applicants as have, by ordinance or legislative act, some special authority to use the city streets?" The right to produce and sell electricity as a commercial product without legislative authority is conceded by the appellees; that business not being a prerogative of government, but open to all, like the manufacture and sale of any other ordinary article of commerce. And the appellant concedes that the use of the city streets for delivering his product to the consumer is a franchise, and that he cannot make such use of the streets without the permission of the State or of the municipal government, acting under legislative authority. These mutual concessions rest upon accepted authority. In *Bank of Augusta v. Earle*, 13 Pet. 595, 10 L. Ed. 274, franchises were defined by Judge TANEY as "special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right; . . . and in this country no franchise can be held which is not derived from a law of the State." In *State v. Cincinnati Gas Co.*, 18 Ohio St. 262, it was said: "It cannot be doubted that the right to use the streets of a city for the purpose of laying pipes to convey gas, whether in the hands of a private corporation or a natural person, is a franchise, and as such can only emanate directly or indirectly

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from the sovereign power of the State. This franchise may be granted directly by the State, or by a municipal corporation, if it is clothed with power to make the grant. Such power in the municipality must either be expressly granted or arise from the terms of the statute by implication so direct and necessary as to be clearly conferred." In *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, the court said: "Any one of the defendants, in point of right and privilege, is the equal of the complainant in this respect. The plaintiff is vested with no exclusive privilege or monopoly to make and sell gas. But the defendants also claim the right to use the public streets of Jersey City for the purpose of placing pipes therein, through which they may furnish gas to their customers. This is a right which the sovereign power can alone confer. The rule must be considered settled that no person can acquire the right to make especial or exceptional use of the public highway, not common to all the citizens of the State, except by grant from the sovereign power. The right to use the public streets of the city for the purpose of laying gas pipes therein is a privilege which the State alone can confer." In *New Orleans Gas Light Co. v. Louisiana Light & Heat Co.*, 115 U. S. 659, 6 Sup. Ct. 252, 29 L. Ed. 516, it was said that the right to place pipes and mains in the public streets of a city for the distribution of gas for public and private use is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of the city acting under legislative authority.

The correctness of these mutual concessions being thus established, the only real question involved is whether the franchise has been granted. There is no pretense on the part of the appellant that any such franchise has ever been directly conferred upon him by any act of the General Assembly of Maryland, but he relies upon section 8 of the new charter, which delegates to the mayor and city council the power to grant specific franchises or rights in the highways, avenues and streets of the city, which, by section 7, are declared to be inalienable; and upon Ordinance No. 107, enacted August 25, 1898, establishing an electrical commission; and he contends that section 11 of that ordinance contains

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a clear grant of the right to use the conduits constructed by the city upon the payment of the rental established by the commission. The appellee, on the other hand, contends that Ordinance No. 107 presupposes that the applicant for space in the conduits has already obtained either from the General Assembly of the State, or from the mayor and city council, under the provisions of the new charter, the right to use the streets for the purpose he desires; so that the question resolves itself simply into one of construction of the new charter. Mr. Dillon, in his work on Municipal Corporations, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the court against the corporation, and the power is denied." That was the rule of construction announced and applied in *Heiskell v. Mayor & City Council of Baltimore*, 65 Md. 148, 4 Atl. 116, 57 Am. Rep. 308, and this rule is applicable as well to the terms and conditions upon which a granted power is to be exercised as to its existence. The right to a franchise is no more to be presumed than the exemption from taxation, and therefore every assertion of such right must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny the right to the franchise. See *Sindall v. Baltimore*, 93 Md. 530, 49 Atl. 645. The argument of the appellant that the power to rent space in the conduits is conferred in clear and unambiguous language and in absolute and unqualified terms is plausible when not critically examined, but cannot stand when such examination is made. The power given to the mayor and city council by section 6 of the new charter (Laws 1898, p. 263, ch. 123) to regulate the use of the city streets for electric light or other wires, under the rule of construction above stated, is no more than the power to prescribe reasonable rules and regulations under which those having a fran-

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chise may exercise it, and Ordinance No. 107 is no more than the enactment of such reasonable rules and regulations; and when these are read, as they must be, in connection with sections 8, 10, 11, and 37 of the charter, it seems to us there is no room left for argument. Section 8 (page 272) provides, that the mayor and city council may grant, for a limited time, specific franchises or rights in or relating to its wharves, landings, highways, avenues and streets, provided such grant is in compliance with the provisions of that article, and that the terms and conditions of the grant be first authorized by an ordinance duly passed, specifically setting forth the nature, extent and duration of the franchise or right so granted; and that no such franchise or right shall pass by implication. Section 10 (page 273) provides, that before any grant of the franchise or right to use any street or avenue either on, above, or below the surface shall be made, the proposed specific grant embodied in the form of an ordinance, with all the terms and conditions, including the provisions as to rates, fares and charges, shall be published by the comptroller twice a week, for three successive weeks, in two daily newspapers of Baltimore City, and that all the provisions of section 37 of that article shall be complied with. Section 11 (page 274) provides that when a franchise is granted in compliance with the previous sections there shall be an express reservation of the right and duty at all times to regulate and control the grant in all matters not inconsistent therewith. Section 37 (page 290) provides that when an ordinance, as prescribed in section 7, has been introduced into either branch of the city council, it shall, after the first reading, be referred to the board of estimates, which shall make diligent inquiry as to the money value of the proposed franchise or right and the adequacy of the proposed compensation to be paid therefor to the city, with other provisions not necessary to be set out in detail here, but all looking to the obtaining of the largest amount obtainable for said franchise or right.

It is obvious that the compensation which is required for the use of the streets by these provisions and the rentals for space in the city conduits are totally distinct matters. One must be as-

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certained by advertisement, in order to obtain the largest amount, while the other may be fixed in the discretion of the city council, and in fact is so fixed by Ordinance No. 81, passed December 10, 1900, for all applicants at so much per duct foot. None of the preliminaries prescribed by the sections to which we have referred have been complied with, and without such compliance the appellant has no more right to demand, and the appellees have no more right or power to grant, the use of the city's conduits, than if the power and right had been expressly reserved to the Legislature alone. This construction is not merely technically and logically correct. It is just and equitable both to the taxpayers and to the appellant. If the city, instead of electing to construct the conduits, had authorized their construction by some person or corporation applying for such right, the applicant could only obtain such right by compliance with all the provisions of law to which we have referred, and yet, in addition to the compensation required for such franchise, would have been at all the expense of construction which here has been borne by the city. It is thus made clear that the rental charged is imposed solely to reimburse the city for its outlay in construction and to provide a fund for the future maintenance of its conduits.

For these reasons the order appealed from will be affirmed. Order affirmed, with costs above and below.

A municipal ordinance authorizing a telephone company to construct and use conduits in a city street, upon its complying with certain conditions, is, if accepted by the company, a contract binding upon the city, and cannot be abrogated or modified by subsequent action of the municipal authorities relative to the use of conduits in the streets of the city by electric corporations. *Chesapeake & Potomac Teleph. Co. v. Mayor of Baltimore*, 7 Am. Electl. Cas. 135, 89 Md. 689, 43 Atl. 784; and see, also, a case between same parties, reported 7 Am. Electl. Cas. 151, 90 Md. 638, 45 Atl. 446.

Placing wires underground.—The city council or other governing body of a municipality has the undoubted right, in the exercise of its police power, to order the placing of its telegraph and telephone wires underground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises. *Northwestern Teleph. Exch. Co. v. City of Minneapolis*, 7 Am. Electl. Cas. 168, 81 Minn. 140, 83 N. W. 527. In this case plaintiff was maintaining overhead wires in the streets of the city under an ordinance imposing conditions as to where its

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poles should be placed. It was attempted by the city to compel the company to bury its wires in streets which were little used. The court said: "The requirements imposed by the later ordinance upon the company to build such conduits through ungraded streets in suburban parts of the city and in the open country, is clearly, upon its face, unreasonable, and the claim to exercise such rights on the part of the common council of the city at their 'will and mere motion' cannot be sustained in the reasonable exercise of the police power, or upon any theory that is consistent with the acquired and vested rights which the plaintiff enjoys under the constitution and the laws. The authority thus demanded by the city touches the limits of absolutism, and, if the rights of the plaintiff to use its franchise depends upon it, it amounts to an unnecessary destruction of property rights, which no municipality can or ought to exercise, and does not receive the sanction of this court." See, also, *Northwestern Teleph. Exch. Co. v. Minneapolis*, 7 Am. Electl. Cas. 179. As to use of conduits by telephone companies having a franchise from the city, see *Commonwealth ex rel. Bell Teleph. Co. v. Mayor*, 7 Am. Electl. Cas. 219, 185 Pa. St. 623, 40 Atl. 93.

Unless impossible or impracticable, a telephone company may be required by a city to place its wires in a conduit constructed by another company pursuant to a contract with the city providing for the rental of the use of the conduit to the city and to electric companies. *City of Rochester v. Bell Teleph. Co.*, 7 Am. Electl. Cas. 211, 52 N. Y. App. Div. 6, 64 N. Y. Supp. 804.

As to the power of a municipality to compel an electric corporation having a franchise for the use of city streets to place its wires underground, see *Barbiste v. Home Teleph. Co.*, 7 Am. Electl. Cas. 75, 50 N. Y. App. Div. 25, 63 N. Y. Supp. 659; *American Rapid Tel. Co. v. Hess*, 3 Am. Electl. Cas. 142, 125 N. Y. 641, 26 N. E. 919; *Matter of City of Geneva v. Geneva Teleph. Co.*, 30 Misc. 236, 62 N. Y. Supp. 172; *Western Union Tel. Co. v. Syracuse*, 24 Misc. 338, 53 N. Y. Supp. 690; *State ex rel. St. Louis, etc., Co. v. Murphy*, 6 Am. Electl. Cas. 64 (Mo. Sup. Ct. 1895); *State, ex rel. St. Louis, etc., Co. v. Murphy*, 6 Am. Electl. Cas. 77 (Mo. Sup. Ct. 1896); *State ex rel. Laclede Gaslight Co. v. Murphy*, 5 Am. Electl. Cas. 71 (Mo. Sup. Ct. 1895).

EXCLUSIVE FRANCHISE.

MUSKOGEE NAT. TELEPHONE CO. v. HALL ET AL.

(*U. S. Circuit Court of Appeals, Eighth Circuit.*)

1. **EXCLUSIVE FRANCHISE TO TELEPHONE COMPANY.**—Telephone companies, like telegraph companies, are important agencies in the transaction of interstate commerce, and no State can grant to one telephone company the exclusive right to operate telephone lines within its borders; what a State cannot do, because it operates as an obstruction to the free flow of interstate commerce, an Indian nation cannot do.

Appeal from U. S. Court of Appeals in the Indian Territory.
Decided October 27, 1902; reported 118 Fed. 382.

C. B. Stuart and J. H. Gordon, for appellant.

Z. T. Walrond, for appellees.

Opinion by THAYER, Circuit Judge:

The decision of the lower courts as respects the Muskogee National Telephone Company was clearly right, unless the exclusive franchise which it asserted to erect and maintain lines of telephone within the Creek Nation can be sustained as a valid grant. If it did not have an exclusive franchise, it goes without saying that it had no right to complain because the defendants were erecting a line of telephone in the town of Tulsa, although they were doing so without lawful authority. No right of the complaining company was violated by their so doing, unless its franchise was exclusive and was being invaded; and that the Creek Nation had no power to grant an exclusive franchise such as is attempted to confer is settled, we think, by the decision in *Pensacola Tel. Co. v. W. U. Tel. Co.*, 1 Am. Electl. Cas. 250, 96 U. S. 1, 8, 24 L. Ed. 708, where precisely such a franchise, granted by the State of Florida as respects only two counties of that State, was adjudged to be in-

valid. It is true that in the latter case the franchise that was held to be invalid had been granted to a telegraph company; but telephone companies are equally agencies of interstate commerce, and every reason which was or that may be assigned against the grant of a monopoly to maintain telegraph lines applies with equal force against the grant of such a monopoly to a telephone company. Telephone companies, like telegraph companies, are common carriers of information, and their lines are daily employed in the transaction of interstate commerce. Some courts have held that a telephone company is included by the words "telegraph company." *Southern Bell Telephone & Telegraph Co. v. City of Richmond* (C. C.), 6 Am. Electl. Cas. 1, 78 Fed. 858, 860, and cases there cited. But be this as it may, telephone companies, like telegraph companies, are important agencies in the transaction of interstate commerce, and no State can grant to one telephone company the exclusive right to operate telephone lines within its borders; and what a State cannot do, because it operates as an obstruction to the free flow of interstate commerce, the Creek Nation (which is said to embrace as much territory as some of the States) cannot do. It is well settled that, in the exercise of its power to regulate commerce among the several States and with the Indian tribes, Congress has full authority to grant rights of way through the land occupied by the five Indian tribes domiciled in the Indian Territory for the construction of railroads (*Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Stephens v. Cherokee Nation*, 174 U. S. 445, 485, 19 Sup. Ct. 722, 43 L. Ed. 1041); and in the exercise of this power it has recently authorized the secretary of the interior to grant rights of way through the Indian Territory for the construction, operation and maintenance of telephone and telegraph lines. (31 Stat. 1083, c. 832, sec. 3.) It follows, of course, that none of these tribes had the power to declare that any one telephone company should have the sole right to construct and operate telephone lines within its borders, since the existence of such a monopoly would have a necessary tendency to prevent free communica-

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tion between those who reside outside of, and those who reside within, the territory. To this extent the grant of such a franchise as the one in question operates to obstruct interstate commerce. [Omitting discussion of effect of act of congress (act March 3, 1901, 31 Stat. 1083), as to telephone franchises.]

CITY OF JOPLIN V. SOUTHWESTERN MISSOURI LIGHT COMPANY.

United States Supreme Court.

1. **STATUTE AUTHORIZING CONSTRUCTION OF ELECTRIC LIGHT WORKS; GRANT OF FRANCHISE TO CORPORATION; RIGHT OF MUNICIPALITY TO COMPETE.**—A statute of Missouri (Law of 1901, p. 60), authorizes a city to erect and operate electric light works for its own use, and for the use of its inhabitants, or permits a grant to any person or corporation to erect such works upon such terms as may be prescribed by ordinance; under such statute a city by ordinance granted a franchise to the appellee to erect and maintain an electric light plant. Subsequently the city adopted ordinances authorizing the issue of bonds for the purpose of erecting an electric light plant to be owned, controlled and operated by the city. It was contended that the city having granted a franchise under the statute to the appellee for the erection and operation of an electric light plant, impliedly contracted with the appellee not to build works of its own, and that the ordinances of the city providing for the erection of a city plant was an impairment upon the obligation of a contract, and, therefore, unconstitutional. It was held that a municipal grant of a franchise to an electric light company under such a statute is not to be construed as conferring upon such company an exclusive franchise, and that the city was not precluded from erecting and operating a lighting system of its own.

Appeal from a decree enjoining a city from erecting and operating an electric light plant. Decided November 16, 1903; reported 24 Sup. Ct. 43.

Statement by Mr. Justice McKenna:

Bill in equity to restrain the appellant from supplying its inhabitants with incandescent lights or other electric lighting in competition with the appellee.

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The city of Joplin is a municipality of the State of Missouri; the appellee is a corporation of said State, and the jurisdiction of the Circuit Court was invoked on the ground that the action of the city impaired the obligation of the contract existing between it and the appellee, in violation of the Constitution of the United States, and hence the appeal directly to this court.

A preliminary injunction was granted. 101 Fed. 23. It was made perpetual upon final hearing, and a decree was entered enjoining the city "from supplying or furnishing to the inhabitants, residents, or any other person, firm or corporation within said city, or any addition thereto or extension thereof, electric lights, either incandescent or arc, or in any other form or manner, for commercial or private lighting, for and during the full term" of the grant to the predecessors and assignors of appellee, to wit, the term of twenty years from and after October 7, 1891. 113 Fed. 817.

A statute of Missouri (Laws 1891, p. 60) authorizes cities to erect, maintain and operate electric light works, to light the streets and supply the inhabitants with light for their own use, and to establish rates therefor. Or they may, the statute provides, "grant the right to any person or persons or corporation to erect such works . . . upon such terms as may be prescribed by ordinance, provided further that such right . . . shall not extend for a longer period than twenty years." Subsequently to, and in pursuance of, this statute, the city, by ordinance, October 7, 1891, granted the right to erect and maintain an electric light plant to certain persons, naming them, their successors and assigns, for a period of twenty years. The plant was erected at considerable expense, and has ever since been maintained and operated. The appellee is the successor of the original grantees.

The ordinance conferred rights and exacted obligations, and fixed, besides, the rates to be charged. It also provided for its written acceptance within ten days after its passage, and the commencement of the work within sixty days. It was accepted.

Subsequently (March, 1899), the city, acting in pursuance of, and in the manner provided in, certain ordinances, issued bonds to the amount of \$30,000, "for the purpose of erecting an electric light plant, to be owned, controlled and operated by the city," and by the means obtained thereby constructed electrical works, erected poles and wires, established a schedule of rates, and entered into the business of commercial electrical lighting in competition with appellee. The bill alleged that the appellee was the owner of real and personal property within the city, which is assessed by the city for municipal taxation, and that appellee is compelled, by reason of such taxation, "to aid and assist in operating and maintaining defendant's (the city's) electric plant and business as a rival and competing one" with appellee's electrical plant and business.

C. H. Montgomery and Samuel W. Moore, for appellant.

John A. Eaton and J. McD. Trimble, for appellee.

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Mr. Justice McKENNA, after stating the case, delivered the opinion of the court:

The foundation of the suit is that the ordinances of March, 1899, and the acts and conduct of the city in entering into competition with the complainant (appellee) impair the obligation of the contract impliedly arising from the ordinance of October 7, 1891, and the acceptance thereof by appellee. In other words, it is contended that under the statute of the state, which we have quoted, the city was given the power to construct an electrical plant and erect poles, etc., to "supply private lights for the use of the inhabitants of the city," or it could grant that right "to any person or persons or corporation" upon such terms as might be prescribed by ordinance. It chose the latter, and granted to the assignors of appellee the right given by the statute, and expressed it to be "in consideration of the benefits to be derived therefrom." And it is hence contended that thereby the city contracted not to build works of its own, and that by doing so it violated section 10 of article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract, and also violated that clause of the fourteenth amendment of that instrument, which provides that no State shall deprive any person of property without due process of law.

It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed, might be destructive. The city, it is further urged, could be indifferent to profits, and

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could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are, besides, countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government.

Many cases illustrate this principle, and some of them were decided in response to contentions similar to those made in the case at bar. In *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. Ed. 585, 22 Sup. Ct. Rep. 400, the village of Skaneateles, under statutes of the State of New York, granted to the water company the right to construct water works, and contracted with it to supply water to the village and its inhabitants for the period of five years. At the expiration of the term of the contract some difference arose about the terms of its continuance, and the village constructed an independent system of water works. A suit was brought by the water company to restrain the further construction of the works and their operation, and the company contended that under the statute of the State by which the village granted to the company its franchises, the village had the election to construct works, or confer such power upon a private company like the water company, and having elected the latter, it impliedly contracted not to construct works of its own. In reply to this contention this court said, by Mr. Justice PECKHAM :

“ There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately

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connected with water, to be left to implication. We think none such arises from the facts detailed."

It is true there was an element in that case which is not in the case at bar. The village of Skaneateles had entered into a contract with the water company to take water from the company. This contract had expired before the city constructed its works. It was not that contract, however, which was alleged to have been impaired, but that which the water company claimed to have been implied by reason of its organization and incorporation, and in pursuance of the application made to, and with the consent of, the village authorities. The ultimate reliance, therefore, of the water company was that from the grant to it the village impliedly contracted not to construct works of its own. The similarity of the contention with that in the case at bar is apparent.

In *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. Ed. 92, 20 Sup. Ct. Rep. 40, 186 U. S. 212, 46 L. Ed. 1132, 22 Sup. Ct. Rep. 820, it was again decided that the granting of franchises to private persons to construct water works in a city does not preclude the city from afterwards erecting such works, and supplying its inhabitants with water.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77, is not in opposition to these views. The city of Walla Walla was, by the statute incorporating it, empowered to erect water works or to authorize the erection of the same. In pursuance of this power it granted a franchise to the Walla Walla company, and contracted to take water from the company, reserving the right to avoid the contract under certain contingencies. But it was provided that: "Until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain or become interested in any water works except the ones herein referred to, save as hereinafter specified." The contract was in force at the time the suit was brought, and the water company had substantially complied with all of its terms and conditions. The contract passed upon, therefore, was expressed and explicit. The power to make it was sustained. In the case at bar, restraint upon the power of the appellant city is claimed to

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be implied by the grant to the appellee. We think, for the reasons stated and upon the authorities cited, such restraint cannot be implied.

Decree reversed and case remanded with directions to dismiss the bill.

PEOPLE'S ELECTRIC LIGHT & POWER CO. v. CAPITAL GAS & ELECTRIC LIGHT CO.

Kentucky; Court of Appeals.

1. **EXCLUSIVE LIGHTING FRANCHISE; INJUNCTION.**—A city sold to a gas company its gas works, and in the contract granted the exclusive right to the use of its streets "for the purpose of laying, repairing and properly operating all mains, etc., and other necessary machinery for the furnishing of all gas or other illuminating light in said city," and thereafter by a supplemental contract agreed to furnish electric lights; subsequently, by an ordinance adopted by the general council of the city, a franchise was granted to another company, authorizing it to use the city streets for furnishing electric lights to the city and its inhabitants, after due advertisement and bids received therefor. The second company sought by injunction to restrain the former company from asserting its alleged exclusive franchise to the detriment of the title claimed by the second company. It was held that injunction was the proper remedy.
2. **EXCLUSIVE FRANCHISE TO FURNISH GAS OR OTHER ILLUMINATING LIGHT.**—The gas company, by its franchise, did not acquire the exclusive franchise of furnishing any light other than gas light; the provision of its contract with the city which granted to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light," was void as to the other "illuminating light." The contract with the city compelled the company to furnish gas, to improve its gas plant, and to extend its gas mains, but did not bind it to erect an electric light plant or to furnish electricity for lighting purposes; it cannot be said, therefore, that it was the purpose of the city to confer an exclusive right upon the company or its assignee, to furnish electricity for the city's use and that of its inhabitants.
3. **FRANCHISE TO HIGHEST AND BEST BIDDER.**—The rights of the gas company, and its assignee, under its contract with the city for the exclusive right to furnish gas, cannot be extended to include electricity, in view of section 164 of the Kentucky Constitution, except by its becoming the best and highest bidder for the additional privilege.

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Appeal by both parties from judgment that neither party had exclusive franchise. Reported 75 S. W. 280. Decided June 16, 1903.

Hazelrigg & Chenault and John W. Ray, for appellant.

John W. Rodman and John B. Lindsey, for appellee.

Opinion by SETTLE, J.:

This equitable action was instituted by the appellant, People's Electric Light & Power Company, to enjoin the appellee, Capital Gas & Electric Light Company, from interfering with its alleged exclusive right to supply the city of Frankfort, its inhabitants, and consumers, with electricity for lighting and other purposes, as provided by its articles of incorporation and authorized by an ordinance of the city. The answer and counterclaim filed by appellee contains six paragraphs, and denies that appellant has or owns the exclusive right, or any right, to supply the city of Frankfort, or its inhabitants, with electricity for lighting, or any other purpose, or that the city council had the power, by ordinance or otherwise, to confer upon appellant any such right, and for further defense avers in substance that it and its assignor and predecessor, the Southern Gasworks Company, by purchase and deed from the city of Frankfort, acquired title to its gasworks, mains, and pipes, and to the exclusive use of its streets and alleys, for the purposes of furnishing gas and electricity for the lighting of its streets and the use of its inhabitants, which right has been confirmed by repeated subsequent contracts made between it and the city, and that this right is about to be interfered with by appellant, for which reason the answer asks an injunction against it.

Appellant filed general demurrer to the answer and counterclaim, and each paragraph thereof, which was sustained to the first, second, fourth, and fifth, and overruled as to the third and sixth, paragraphs. Thereupon an amended answer and counterclaim was filed by appellee, to which and to the several paragraphs of the original answer, as amended, appellant again filed a general

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demurrer, and, the case being submitted on that demurrer, it was sustained as to the first, second, fourth, and fifth paragraphs of the answer as amended, and also as to the new paragraphs added by the amended answer, to all of which appellee excepted. The cause was then submitted for trial and judgment upon the pleadings and an agreed writing containing all the evidence, documentary and otherwise, upon which the parties relied in support of their respective contentions. Whereupon the special judge, expressing his views in a well considered and ably written opinion, rendered judgment to the effect that neither appellant nor appellee has the exclusive right to use the streets of the city of Frankfort for the purpose of furnishing electricity to the city or its inhabitants for lighting purposes, and enjoining each of them from asserting any such exclusive right. Appellant and appellee each excepted to the judgment and prayed an appeal to this court, and the case is now before us upon both appeals for final adjudication.

The facts presented by the pleadings and evidence are as follows: The city of Frankfort, by a written contract of May 30, 1882, made with the Southern Gasworks Company, the assignor of appellee, sold to it its gasworks, which had theretofore been constructed and was then being operated under a charter from the Legislature granted the city. By the terms of this contract it granted, or attempted to grant, to the Southern Gasworks Company the exclusive right to the use of its streets "for the purpose of laying, repairing, and properly operating all mains, pipes, and other necessary machinery for the furnishing of all gas or other illuminating light in said city." The consideration of this sale, as recited in the contract, was the undertaking of the Southern Gasworks Company to execute to the city forty interest-bearing bonds of \$1,000 each, payable forty years from July 1, 1882, with the privilege reserved of paying the bonds, or any one or more of them, before maturity. The company further undertook to improve the gasworks, extend the mains, to light a certain number of street lamps at the price named in the contract, and to furnish private consumers gas at not exceeding \$2 per 1,000 cubic feet;

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but this maximum price was to be adjusted every five years, so as not to exceed the average price charged for gas in cities or towns of the same or a less population than Frankfort. The contract mentioned, and all rights incident and appertaining thereto, were assigned by the Southern Gasworks Company to the appellee, Capital Gas & Electric Light Company, which became incorporated by a legislative act approved April 24, 1882, and by deed of June 27, 1882, the city of Frankfort conveyed appellee, as assignee of the Southern Gasworks Company, all the property and rights which it had agreed theretofore to sell to the Southern Gasworks Company; it being recited in the deed that the appellee had already executed and delivered the forty bonds required of the Southern Gasworks Company by its contract with the city. The appellee by the terms of the deed was to assume and carry out all the undertakings of its assignor with the city. By virtue of the rights thus acquired under the contract and deed mentioned, appellee only manufactured and furnished gas for several years for the use of the city and its inhabitants; but about January 1, 1890, it constructed an electric light plant, and began for the first time to furnish electric lights to the city and its inhabitants, though no contract was made by appellee with the city in reference to electric lighting until September 18, 1893, at which time a new or supplemental contract was made between appellee and the city, under which the electric lights were to be furnished. This contract contained the statement that it was entered into at the request of the city, and because it desired a modification of the former contract. It appears that since that time various supplemental agreements have been made between the parties from time to time for the continued lighting of the streets; but neither the contract of September 18, 1893, nor any of those of subsequent date, contain any provision or agreement requiring appellee to furnish electricity to private consumers or regulating the price thereof.

Appellee's claim of the exclusive right to the use of the streets of the city for furnishing electricity to the city and its inhabitants for lighting purposes is based upon its various contracts with the

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city. Upon the other hand, the appellant, People's Electric Light & Power Company, contends that it has the exclusive right to the use of the streets for the furnishing of electric lights to the city and its inhabitants by virtue of the ordinances of the general council passed July 23, and August 13, 1901, and that the franchise granted it by these ordinances was duly advertised for sale, and bids therefor were received publicly, and that the franchise was thereby awarded to it as the highest bidder. It is averred by appellants that appellee is wrongfully asserting an exclusive right or franchise to supply electricity to the city and its inhabitants for lighting purposes, and is thereby casting such a cloud upon its title that it is being prevented from selling, pledging, or mortgaging its stock, or selling its bonds, whereby to raise the money with which to erect its plant, and it therefore asks that appellee be enjoined from asserting the claim of exclusive right set up by it.

We think the special judge properly sustained the appellee's general demurrer to the extent indicated in the judgment. The first paragraph of the answer interposes the defense that appellant cannot maintain the action to quiet its title to a franchise to light the city of Frankfort with electricity, as it is not in possession of the streets and alleys of the city, the use of which is necessary to the enjoyment of its franchise. The contention of appellant is that the cloud cast upon its title to the franchise is preventing it from selling, pledging, or mortgaging its stock, or selling its bonds, in consequence of which it has been unable to erect its electric plant, or to enjoy the franchise granted it by the city of Frankfort. In such a state of case, injunction is the only remedy, if, as a matter of fact, appellant owns the exclusive franchise to which it lays claim. This point seems to have been well settled in *Citizens' Gaslight Company v. Louisville Gas Company*, 81 Ky. 263.

The second paragraph contains a plea of the statute of champerty, which has no place in a case like this. Although it may have been true that, at the time of the grant of the franchise from the city of Frankfort to appellant, appellee was exercising a like franchise under claim that it was exclusive, such a claim, unless true

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in fact, could not prevent the city from granting a similar franchise to appellant. Upon the other hand, if appellee's franchise was exclusive, the grant of the franchise by the city to appellant was simply void.

The third paragraph of the answer, by denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, raised an issue of fact upon which proof was necessary. Therefore this paragraph was properly held to be good upon demurrer.

The fourth and fifth paragraphs set forth the various contracts between appellee and the city, upon which its claim to the exclusive franchise is based, and they present the contention that the grant of the franchise to appellant is void, because its effect is to impair the obligation of appellee's contract with the city. By legislative sanction the city of Frankfort was invested with the title to its streets and alleys, and all other property of the city, including its gasworks and waterworks; all being under the exclusive control of the city council. By an act of March 28, 1872 (Laws 1871-72, p. 393, c. 899), it was provided "that the board of councilmen of the city of Frankfort be, and they are hereby, authorized to grant, bargain, sell, and convey, to rent or lease, any and all property, or any part thereof, belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums, and at such times, as said board of councilmen shall deem for the best interest of said city of Frankfort."

We find in appellee's charter the following provisions: "Said company shall furnish gas light or electric light to any person on such terms as the company and such person may agree upon, and any such contract shall be obligatory and enforceable in any proper court in this commonwealth"—and, further, that the appellee company shall have authority "to put up lamp posts and electric lights, and that said gas and electric lights shall be furnished to the city at a reasonable price per light per annum, as may be agreed on." It is contended for the appellee that these

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provisions of its charter, considered with those of the charter of the city, conferred upon the city ample power to grant appellee the exclusive franchise asserted by it; and it is conceded by the special judge that some of the authorities cited by council for appellee tend strongly to support that contention, though he properly, as we think, declined to accept that view. We agree with him that the question of whether the city has the power to grant an exclusive franchise, such as is claimed by appellee in this case, is not before us for decision. In our opinion, it did not, by its several contracts with the city, obtain the exclusive franchise claimed for it, even though it be conceded that the city was authorized to grant it.

The Southern Gasworks Company, appellee's assignor, made the original contract with the city, under which appellee claims title to the franchise asserted by it. It is clear that the charter of the Southern Gasworks Company provided only for the furnishing of gaslight. It conferred no authority to use any light other than gaslight, and its contract with the city was to furnish only gaslight; indeed, it was unprepared to furnish any other. We therefore further agree with the special judge that the contract which granted, or attempted to grant, to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light" was void as to "other illuminating light."

An examination of the charter of appellee will show that it did confer power to make and supply electricity, and to accept from the city a grant of the use of its streets for that purpose; and the city having carried out its contract with the Southern Gasworks Company, by executing a deed to appellee, as its assignee, conveying to it the gasworks, and the exclusive use of the streets of the city for supplying "gas or other illuminating light," it becomes important to determine the effect of that deed. It will be borne in mind that the Southern Gasworks Company did not, in its contract with the city, undertake to erect an electric plant, or to supply electric light to the city or its inhabitants. It did, however, undertake to issue \$40,000 worth of bonds, and to improve

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the gasworks, extend the mains, and supply gas to the city and other consumers at agreed prices specified in the contract. The appellee, as assignee of the Southern Gasworks Company, assumed by the deed only such obligations as rested upon the latter; nothing more. Therefore it was under no duty to erect an electric plant, or to furnish electricity to the city or its inhabitants for lighting. We do not think it was the purpose of the city to confer an exclusive right upon appellee's assignor, or upon it, to furnish electricity for the city's use and that of its inhabitants, without imposing an obligation to compel it to exercise that right.

It is contended, however, by counsel for appellee, that the incorporation of such an obligation in the contract was unnecessary, as it was required by its charter to furnish electricity for lighting purposes. We are of opinion that the provision of appellee's charter that "said company shall furnish gas or electric light to any person on such terms as the company and such person may agree upon" only expressed the duty which rests upon every corporation enjoying a public franchise to serve all alike, and does not compel the exercise of the franchise. We find that, for seven years after its right to use the streets of the city for lighting purposes was secured, appellee failed to use electricity for that purpose; and this failure to exercise its electric light franchise demonstrates that it was under no obligation to do so. Furthermore, there was no time during that seven years that it could have been compelled by the city to furnish electric lights to it or its inhabitants; and yet appellee insists that it had the right to prevent any other person from doing so. We are unable to find anything in any of the contracts between the city and appellee that requires the latter to furnish electric lights for the use of the city or its inhabitants. Upon the contrary, we find in all of them that appellee has been careful not to recognize any obligation on its part to supply electricity. There is no ground for appellee's contention that its alleged exclusive franchise was confirmed by its contract of 1893 made with the city of Frankfort. The language of that contract shows no purpose or attempt to confer upon appellee any new

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right; and, in view of section 164 of the present Constitution, it was without authority to enlarge appellee's rights under the first contract, except by its becoming the highest and best bidder for the additional privilege; and, besides, it is by no means certain that the city had the power to grant an exclusive franchise. In the case of *City of Newport v. Newport Light Co.*, 21 S. W. 645, this court held that an exclusive gas franchise, which had been conferred by the city upon the light company, did not confer the exclusive right to supply electricity for lighting purposes, though the contract authorized the light company to substitute electricity for gas.

We do not feel called upon to consider the contention of appellant that the grant from the city to appellee is in perpetuity, and therefore void. It was the opinion of the special judge that the grant is limited to forty years, because the bonds issued by appellee to the city, which are secured by lien on its property and franchises, were made payable in forty years. We are not disposed to question the correctness of this view of the law; but, as the pleadings make no issue on this question, its consideration is unnecessary. Nor is it necessary to decide that the failure of appellee to exercise its alleged exclusive franchise for several years prior to January 1, 1890, worked a forfeiture thereof, as such nonuser and consequent forfeiture are not pleaded by appellant. It is manifest that the appellant's franchise is not exclusive, as the language of the ordinance granting it will show. Upon the whole case, we have found no difficulty in reaching the conclusion that neither appellant nor appellee is entitled to the exclusive franchise claimed.

There are one or two other questions connected with the case that might be discussed, though not raised by the record; but, as we are of the opinion that we have passed upon all that are material to a proper decision of the case, they have not been considered.

For the reasons herein indicated, the judgment of the lower court is affirmed upon both the original and cross appeal.

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Exclusive franchise not permissible.—Independent of statutory authority, a municipality cannot grant to a public service corporation the exclusive right to the use of its streets. *Clarksburg Electric L. Co. v. City of Clarksburg*, 7 Am. Electl. Cas. 25, 47 W. Va. 739, 35 S. E. 994 (citing *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Richards v. Clarksburg*, 30 W. Va. 496, 4 S. E. 774; *Arberry v. Railroad Co.*, 33 W. Va. 6, 10 S. E. 14, 5 L. R. A. 371). Although under authority of *New Orleans Gas L. Co. v. Louisiana L. & H. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510, and a number of other cases, the legislature may, by an exercise of its plenary power, grant an exclusive franchise to such corporations.

In the case of *Cons. Elect. L. Co. v. People's Elect. L. & G. Co.*, 4 Am. Electl. Cas. 250, 94 Ala. 372, 10 So. 440, the court said: "Vested rights, properly so-called, are respected in judicial administration; but no one, under ordinary circumstances, can assert and maintain a vested right to the exclusive enjoyment of a public street. Monopolies are not favorites of the law, and if a street have sufficient width and capacity to admit of more than one public enterprise, without unduly obstructing it as a highway, an exclusive right should not be granted to one company; and if granted, except under peculiar circumstances, it may and should be revoked."

SIMILAR FRANCHISES TO SEVERAL CORPORATIONS.

CHICAGO TELEPH. CO. v. NORTHWESTERN TELEPH. CO.

Illinois; Supreme Court.

1. **FRANCHISE TO CORPORATION NOT IN EXISTENCE.**—An ordinance granting to a telephone company a franchise for the use of city streets for its wires and poles is not effectual until accepted. It is not material that at the time the ordinance was presented, the company was not fully organized. It is sufficient if it was fully organized and had a right to transact business at the time of the passage and acceptance of the ordinance.
2. **QUESTIONING VALIDITY OF FRANCHISE.**—The validity of an ordinance granting such a franchise cannot be questioned by one not a party thereto.
3. **FRANCHISE NOT EXCLUSIVE; RIGHTS OF SUBSEQUENT GRANTEE.**—A franchise for the use of streets to one telephone company does not preclude a grant of a similar franchise to another company. The grantee of the subsequent franchise is required to so exercise its powers thereunder as not unnecessarily and unreasonably to interfere with the operation by the former company of its telephone system.
4. **CONSTRUCTING LINES ON SAME SIDE OF STREET.**—Overbuilding and paralleling by the latter company of the wires of the former company on the same side of a street is not an unnecessary and unreasonable interference.
5. **DANGER FROM BREAKING OF WIRES.**—An injunction will not be issued to restrain the subsequent occupant from overbuilding the wires of the prior occupant; the alleged danger of the breaking and falling down of the overbuilt wires upon those of the prior occupant is too remote and uncertain.

Appeal by complainant from judgment of appellate court (100 Ill. App.), affirming a decree for defendant. Decided October 25, 1902; reported 199 Ill. 324, 65 N. E. 329.

Albert J. Hopkins, Fred A. Dolph, and Robert Bruce Scott (*Holt, Wheeler and Sidney*, of Counsel), for appellant.

Murphy, Alschuler & Newhall (*Mezzani Slusser and Samuel Alschuler*, of Counsel), for appellee.

Opinion by MAGRUDER, C. J.:

1. The first point made by appellant is that the ordinance of August 7, 1899, under which appellee proceeded to construct its telephone system in the streets of Aurora, is a void ordinance, and that for that reason appellee in such construction proceeded without lawful authority, and is a mere trespasser. The first ground upon which it is claimed that the ordinance of August 7, 1899, is void is that it was not read at the time of its presentation to the common council of the city of Aurora on July 17, 1899. [Omitting discussion as to invalidity of ordinance for failure to read, holding that the presumption is that it was read as required by the rules.]

The second ground upon which it is alleged that the ordinance of August 7, 1899, is void is that, when it was introduced into or presented to the city council of Aurora on July 17, 1899, appellee had no legal existence as a corporation. On July 6, 1899, the statement for the incorporation of appellee was executed. On July 7, 1899, it was filed in the office of the secretary of state. On July 22, 1899, the commissioners, who had opened books for subscription to the capital stock of appellee, reported to the secretary of state that the stock had all been subscribed, and the secretary on that date issued a certificate of organization. On July 24, 1899, this certificate was filed in the office of the recorder of Will county, the county in which the principal office of the appellee is located. It thus appears that the ordinance granting to the appellee its privileges, and finally passed on August 7, 1899, was presented to the common council of Aurora seven days before the certificate of appellee's organization was filed in the recorder's office, as required by the corporation act. Section 4 of chapter 32 of the Revised Statutes of Illinois, in regard to corporations, provides that "upon the recording of the said copy the corporation shall be deemed fully organized, and may proceed to business." Although the certificate of complete organization was not filed in the recorder's office until July 24th, seven days after July 17, 1899, when the ordinance was presented to the common council of Aurora, yet the ordinance was so presented to the city council of

Aurora after appellee had been licensed by the secretary of state to incorporate. We do not think that the appellee's charter is null and void for the reason thus insisted upon.

In support of its contention upon this branch of the case appellant refers to cases decided by this court, which hold that a corporation should have a full and complete organization and existence as an entity, before it can enter into any kind of a contract or transact any business; and that a corporation assuming to be created under the incorporation act of this State can have no right to transact business when the certificate of its complete organization has not been filed for record in the recorder's office, as directed by the statute. *Gent v. Insurance Co.*, 107 Ill. 652; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99. The cases thus referred to do not sustain the contention that the ordinance of August 7, 1899, was void, because it was introduced into the common council before the complete organization of appellee under the statute. A privilege granted by a city to construct a public improvement in the streets is a mere license to the corporation until the corporation accepts the grant and constructs the public improvement thereunder in accordance with the terms and conditions of the same. When the grant is accepted by the corporation, after the passage of a legal ordinance granting it, and in pursuance of the terms of such ordinance, then there is a contract between the city and such corporation. Here the introduction of the ordinance in the common council was merely in the nature of an offer or proposition, and did not become a contract until the ordinance was subsequently passed and accepted. No action was taken by the city in reference to the ordinance when it was first introduced, but it was laid over under the rules until the next meeting. Before August 7, 1899, the city had not bound itself by any contract to the appellee. The ordinance was, from July 17, 1899, until its passage on August 7, 1899, merely under consideration by the city council. In the meantime, on July 24, 1899, two weeks before the ordinance was finally passed, appellee became fully and completely organized by receiving its certificate of complete organization from the secretary of state, and filing the same with the recorder

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of deeds of Will county, where its principal office was situated. It was not until after the appellee was thus completely organized that the matter came before the city council for its final action, and then the city council by unanimous vote passed the ordinance making the grant to the appellee. The city suffered no harm or injury from the fact that appellee was not completely organized when the ordinance was originally presented to the council. It is sufficient that appellee was fully organized, and had a right in law to transact business, at the time of the passage of the ordinance and of its acceptance. The case of *Clarksburg Electric Light Co. v. City of Clarksburg*, 7 Am. Electl. Cas. 25, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, is a case in point upon this subject. In the latter case it was held by the Supreme Court of West Virginia that the grant by a city or town to an intended corporation of a privilege to use its streets for the conveyance of electricity for public use in the town or city is valid, though at its date the corporation is not chartered, but is later chartered, and accepts the grant. The West Virginia case is stronger than the case at bar, for the reason that there the application for incorporation was made before the passage of the ordinance making the grant, but the incorporation was not completed until after the actual passage of the ordinance making the grant. Counsel for appellant rely upon the case of *Stevens v. Borough of Merchantville*, 62 N. J. Law, 167, 40 Atl. 688. In the New Jersey case, however, it is to be observed that the ordinance had passed the first and second reading before any steps had been taken towards the organization of the corporation. No steps were taken for the organization there until the day before the ordinance came up for final passage on the third reading. In the case at bar the application had been made to the secretary of state for license to incorporate, and the parties had received license from that official, before the ordinance was introduced into the city council. Again, the New Jersey case arose in a direct proceeding brought to test the validity of the ordinance there under consideration. See, also, *Richelieu Hotel Co. v. International Military Encampment Co.*,

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140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 227; *People v. Central Union Tel. Co.*, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583; *Wharf Co. v. Judd*, 108 Mass. 224. We are of the opinion that the ordinance of August 7, 1899, is not invalid for the second reason insisted upon by the appellant.

It is doubtful, however, whether the question as to the validity of this ordinance can be raised in this proceeding. It is a familiar principle of law that the validity of a franchise or charter cannot be questioned or tested in a collateral proceeding, but only in a direct proceeding, instituted by the city or the people through the proper person or official. *Thompson v. Candor*, 60 Ill. 244; *Bushnell v. Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Lees v. Commissioners*, 125 Ill. 47, 16 N. E. 915. The ordinance making the grant to appellee, having been accepted and acted upon by appellee, has become a contract between itself and the city; and appellant, not being a party to that contract, has no right to question its validity. *City of Quincy v. Bull*, 106 Ill. 337; *People v. Central Union Tel. Co.*, *supra*; *City of Bellville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Chicago Gen. Ry. Co. v. Chicago City Ry. Co.*, 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; *Chicago City R. Co. v. People*, 73 Ill. 541; *Chicago Municipal Gaslight & Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616. It is also to be observed that an obstruction in the nature of a public improvement placed in the streets of a city by the permission of the city, either express or implied, is strictly a matter between the city and the private corporation constructing the improvement; so that any action to test the right to so obstruct the street should be brought by the city, or by some public officer on behalf of the city. *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; *Chicago Gen. Ry. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605, 54 N. E. 1026; *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, 56 N. E. 963; *People v. General Electric Ry. Co.*, 172 Ill. 129, 50 N. E. 158.

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2. The second question presented by the record in this case is mainly a question of fact, and that is whether appellee has been guilty of such an interference with the rights of appellant as to justify the issuance of the injunction prayed for in the bill. After a careful examination of the record, we are satisfied that the material averments of the answer filed by appellee in the court below are sustained by the proofs. Section 3 of the ordinance of September 6, 1881, relied upon by the appellant in its bill, provides as follows:

"The said common council expressly reserves the power to grant the right of way through, in and upon said streets, alleys and public grounds for the erection, maintenance and use of the necessary poles and posts and wires of any other telephone company or individuals whenever requested, so as not to interfere with the right hereby granted to the Chicago Telephone Company, its successors and assigns."

It thus appears that in the ordinance by the terms of which the city of Aurora granted to the appellant the right to establish its telephone system in the streets of that city, the city expressly reserves the power to grant the right of way through the streets for the erection and use of the necessary poles and wires of another telephone company than appellant. If there had been no such provision in the ordinance of September 6, 1881, the city of Aurora had no power, under the laws of this State, to grant the exclusive use of its streets to one company alone for telephone purposes. The title of the streets is vested in the city, and it holds such title in trust for the benefit of the public, and must hold and control the possession of the streets exclusively for public use. *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223. In *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, 56 N. E. 963, we said (page 595, 184 Ill. page 965, 56 N. E.):

"Whilst it is a legitimate use of a street to allow a steam railroad track to be laid and operated along or across it where there is legislative authority therefor, the railroad company can acquire no exclusive right in the street; nor is there power in the municipality to grant such exclusive use of a street to a railroad company."

A city council has no power, under the city and village act of this State, to grant an exclusive franchise to a private corporation to use its streets for the purpose of conducting and maintaining a telephone system in the city. Such an exclusive grant cannot prevent a city from granting to another corporation the privilege to occupy its streets for the same purpose. *Clarksburg Electric Light Co. v. City of Clarksburg, supra.* The city of Aurora, in view of its want of power to grant any exclusive right to the use of its streets for telephone purposes by the appellant, made the reservation contained in section 3 of the ordinance of September 6, 1881, as above quoted. By that section the city reserves to itself the right to grant authority to any other telephone company than the appellant to erect its poles and string its wires in the streets of Aurora "whenever requested, so as not to interfere with the right hereby granted to the Chicago Telephone Company, its successors and assigns." The right to grant the same privilege to another telephone company is coupled with the limitation that the right granted to the appellant is not to be interfered with. What, then, was the right granted by the ordinance of September 6, 1881, to the appellant? Section 1 of that ordinance provides "that the Chicago Telephone Company, its successors and assigns be, and is hereby, granted the right of way through and upon the streets and alleys and public grounds of the city of Aurora, in the county of Kane, State of Illinois, for the uses and purposes therein and thereon, to erect, maintain and use all the necessary poles and posts of wood, iron or other suitable material and the necessary wires to successfully operate and use a system of telephones or telephone exchange in the city of Aurora," subject to certain provisions therein set forth, such as that the appellant's poles and posts shall be so set and its wires so placed as not to interfere with travel, and that the parts of the streets used by the appellant shall be kept by it in good order and repair, and that the city "may use said poles at any time for the purpose of fire alarm telegraph," and that whenever any of said poles shall become a nuisance the common council may order its removal, and that the same shall

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be so set as not to interfere with the flow of water in any gutter or drain, and that the points of location shall be determined under the direction of the committee on streets and alleys or the street commissioner. Appellee, therefore, under its charter, had the right to construct its telephone system in the streets and alleys of the city, provided it did not interfere with the right of appellant to erect and use all the necessary poles and wires to successfully operate and use a system of telephones or telephone exchange in the city.

The material question, therefore, is whether, under the evidence in this case, the appellee has so used and constructed its telephone system in the streets of the city of Aurora as to interfere with the right of appellant to erect and use all the necessary poles and necessary wires to successfully operate and use its system of telephones. It necessarily results from the fact that the city has a right to grant the privilege of operating a telephone system to different companies, that there will necessarily be some interference by one company with another. Wherever telephone companies occupy the public streets with their poles and wires, there will, as a matter of course, be some interference between them. The thing to be guarded against is such an interference as will prevent the practical operation of any one telephone system. In other words, it was and is the duty of appellee so to construct and use its telephone system as not unnecessarily and unreasonably to interfere with the operation by appellant of its system. To grant any one company the exclusive right to use the streets would be to establish a monopoly. Joyce, in his work on Electrical Law (sec. 517), says:

“Upon the question of interference by the electric light wires of one company with the wires of another electrical company, the following general rule may be stated, being clearly sustained by the weight of authority. As between an electric light company and another electrical company, whether that company be a telegraph, telephone, or an electric light company, prior authority to occupy, or prior occupation of the streets, will not confer upon such company an exclusive right. The right of the prior licensee, however, must not be substantially invaded by the later company. Such subsequent licensee is under the duty to so maintain its wires and lines as not to inter-

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fere with the right of the prior occupant of the streets to properly maintain and operate its lines, and to transact the business it is authorized by its franchise to transact."

In the recent case of *Louisville Home Tel. Co. v. Cumberland Telegraph & Telephone Co.* (decided by the Federal Circuit Court of Appeals for the Sixth Circuit), 8 Am. Electl. Cas. 108, 49 C. C. A. 524, 111 Fed. 663, where a telephone company constructed its line in the streets of a city under a franchise granted therefor, which expressly reserved the right to the city to grant similar rights to other companies, and thereafter a franchise was granted to a second company, which was required to construct its line under the direction of the board of public works, and such board required its line on certain streets to be placed on the same side and over the same space occupied by the first company, it was said by the court:

"The circuit court appears to have accepted as correct the contention of the complainant that by its prior occupation of the space which it occupied by erecting its poles, cross-arms, and wires over a width of eight feet and at the height of twenty-five feet it acquired an exclusive right to occupy that width of space from the ground upward without limitation, and this without any intrusion by another party. . . . In this the court misconceived the nature and extent of the rights of the complainant. It may properly be conceded that its prior occupation of space, under the franchise granted by the statute and ordinance, would entitle it to continued enjoyment thereof, so long as it continued to perform its obligations, without substantial impairment. But its right is not absolutely exclusive. It is subject to such incidents as result from the exercise of the rights of other parties who have acquired a valid franchise of similar character. It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant. For the property right of the first is not to a monopoly. It is bound to exercise its privilege in such a way as to give room to another coming in under the power reserved. In the present case the common council of the city expressly reserved the authority to grant to others, if it should deem it for the public interest, the same privileges in its streets as it granted to the complainant. . . . It is not intended, of course, to say that the first occupant may be despoiled, or the substance of its right appropriated. But this does not happen from merely giving place to a rival company, whose presence was expressly stipulated for by the contract, nor, probably, if the presence

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of the new party was the result of the exercise of a power reserved by implication in such a grant of privileges." *Cumberland Telegraph & Telephone Co. v. United Electric R. Co.* (C. C.) 3 Am. Electl. Cas. 408, 42 Fed. 273, 12 L. R. A. 544; *Rocky Mountain Bell Tel. Co. v. Salt Lake City Ry. Co.*, (Utah), 3 Am. Electl. Cas. 350; *Western Union Tel. Co. v. Guernsey & S. Electric Light Co.*, 3 Am. Electl. Cas. 425, 46 Mo. App. 120; *Illinois Cent. R. Co. v. City of Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530.

In *Illinois Cent. R. Co. v. City of Chicago*, *supra*, where a court of equity was asked to grant an injunction against interference with the operation of a railway at a street crossing, we said (page 603, 141 Ill., page 1048, 30 N. E., 17 L. R. A. 530):

"It is well understood that the track or right of way cannot, in the nature of things, be restored to the same state of usefulness with the street thereon as before. It is to be restored so as not to impair its usefulness more than is necessary in view of its use for the purposes of a street, subject to the use by the railroad company. It is not to be rendered less useful, except in so far as diminished safety and convenience are inseparable from its use by the public as a street crossing. It is not expected that the crossing can be so restored as to obviate all danger, or delay, or inconvenience. It is only necessary that there should be no unreasonable impairment of the usefulness of the railroad right of way."

One of the interferences with appellant's system of telephone which is charged against appellee is that in many of the streets of the city appellee has erected its telephone poles and strung its telephone wires upon the same side of the street where the telephone poles and wires of appellant are set and strung, and that appellee has been guilty of overbuilding the poles and wires and telephone system of appellant; that is to say, that it has strung its wires above the telephone wires of appellant, instead of stringing them below the same. In other words, appellee is charged by appellant with "overbuilding" and "paralleling," as the terms are used by the expert witnesses. If the city has no right to grant the exclusive use of the street to one telephone company, and has the right to grant the use thereof to two or more telephone companies, then the right of a later telephone company, coming into the street, to place its telephone lines upon the same side of the street with the telephone company coming earlier therein, necessarily results as a matter of course. There are only two sides to each street, and, if there are more than two telephone com-

panies, two of them must necessarily be on the same side of the street. If one telephone company has no right to the exclusive use of the street, it has no right to the exclusive use of one side of the street. In the case at bar the evidence shows that on many of the principal residence streets in the city appellant has its poles and wires set and strung upon both sides of the street. Necessarily, therefore, in such cases the appellee was obliged to be, for a part of the route at any rate, upon the same side of the street with appellant. In the case already referred to of *Louisville Home Tel. Co. v. Cumberland Telegraph & Telephone Co.*, *supra*, it appeared that the second company placed its line of poles and wires on the same side of the street occupied by the first company, and this was there held to be no substantial interference with the rights of the first company. The right of the appellee to be upon the same side of the street with the appellant is substantially conceded by appellant in its bill, because it therein avers that "it was and is the duty of said Northwestern Telephone Company to so construct its lines as not to unnecessarily interfere with the system and lines of your orator; that it was and is the duty of said defendant company in the construction of its lines, in cases where it is absolutely necessary to cross or parallel the lines of your orator, to underbuild the lines of your orator." This allegation is, in effect, an admission that, where it is absolutely necessary, appellee can parallel appellant's lines of wires; that is, can be upon the same side of the street with appellant.

Appellant, in addition to the contention that appellee should not be upon the same side of the street with it, contends that it should not overbuild appellant's telephone system; that is, that it should not, by the use of higher poles than those of appellant, string its wires above those of appellant. Appellant contends that appellee should underbuild, instead of overbuilding; that is, should string its wires under those of appellant, instead of stringing them over those of appellant. The testimony shows that there are in the streets of Aurora some nine companies or interests making use of the streets for the purpose of erecting poles and stringing wires, to wit, appellant and appellee, the city arc light system,

the city fire alarm system, the city police alarm system, the Western Union Telegraph Company, the Postal Telegraph Company, the Aurora Electric Light & Power Company, and the street railway company. The wires of the Aurora Street Railway, the Aurora Electric Light & Power Company, and the Aurora electric lights carry high potential currents of electricity, while the wires of the telegraph companies, of the city police alarm and city fire alarm, and the wires both of appellant and appellee carry low potential currents of electricity. The proof shows that in the proper construction of overhead system of wires the different high potential systems of wires should be placed on one side of the street by themselves, and the different low potential systems of wires should be placed on the other side of the street by themselves. The reason of this is, as stated by the different experts, that, if the wires of the high potential system drop and come in contact with the wires of a low potential system, the high potential current of electricity is thus conveyed from the high potential wires into the wires of the low potential system, and damage and injury to life and property are liable to follow such a contact. But if a wire conveying a low potential current of electricity drops down upon another wire conveying a low potential current of electricity, no harm is ordinarily done, except that the two wires, forming a contact, disarrange the service of each until the two wires are separated. Thus, if a wire of one telephone system drops upon a wire of another telephone system, the telephones along the lines of each of these two wires will not work properly until the wires are separated. So, on the other hand, if a wire conveying a high potential current of electricity drops upon another wire conveying a high potential current of electricity, no particular harm is ordinarily done further than perhaps the burning of a fuse, or something of that kind. Inasmuch as the wires both of appellant and of appellee convey low potential currents of electricity, the dropping of the wire of one upon the other would do no particular harm. The evidence shows that in many instances, and on many streets, appellee overbuilt appellant's system, or strung its wires above those of appellant on the same side

of the street with the appellant, because, if it had crossed the street with its wires and strung them on the opposite side of the street, it would have been obliged to string them above wires conveying high potential currents of electricity. This would lead to the risks and dangers necessarily arising from the falling of a wire conveying a low potential current of electricity upon a wire conveying a high potential current of electricity.

It is impossible for us, within the limits of this opinion, to examine all the evidence in this immense record in regard to the various points of alleged interference to which attention is called in the argument. We will only refer to one instance. When appellee constructed its system of poles and wires on Rathbone avenue in Aurora, it found that the city of Aurora had a line of poles, supporting its high potential city arc lights, along the north side of the avenue for a distance of one-half or three-fourths of a mile; that appellant had overbuilt the city arc light wires along the entire north side of the avenue to a distance of about half a mile, and then its wires crossed from the north to the south side of Rathbone avenue, and continued along the south side a distance of six spans. The ordinance of August 7, 1899, under which appellee constructed its telephone system, provided that its work should be constructed under the supervision of the city electrician. The evidence shows that, wherever it has constructed its system, appellee has acted under the instructions of the city electrician. It was instructed by the city electrician to build its line along the entire south side of Rathbone avenue. When it came to the six spans where appellant, crossing over from the north to the south side of the avenue, had built its system on the south side of the avenue, it was obliged to overbuild the wires of appellant for the distance of this space of six spans. The direction of the city electrician that appellee should build its line on Rathbone avenue on the south side of the street compelled it to be on the same side of the street with appellant so far as the six spans in question were concerned, inasmuch as the latter were upon the south side of the avenue. Appellee was obliged to overbuild, rather than underbuild, the appellant's telephone line for the distance of these six

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spans for the following reason: By section 2 of the ordinance of August 7, 1899, it was provided that appellee, its successors and assigns, "shall be subject to all ordinances now in force, or that may hereafter be passed, relative to the use of the public streets and alleys of said city," etc. On February 4, 1884, the city of Aurora passed an ordinance providing as follows: "When such permission shall be granted by common council, the setting of such poles shall be under the supervision and direction of the committee on streets and alleys. The wires of such line shall be placed on straight poles not less than 30 feet in height about the ground." Where appellant had erected its telephone system on the south side of Rathbone avenue for the distance of the six spans in question, it had used poles only 30 feet long, 5 feet of which were in the ground and only 25 feet above the surface thereof. It was, therefore, impossible for appellee to string its wires under those of appellant upon this avenue; or, in other words, it was impossible for it to use the system of underbuilding in view of the general ordinance of February 4, 1884, which require it to use poles not less than 30 feet in height above the ground. If it had adopted the system of underbuilding, it would have been obliged to string its wires at a distance of less than 25 feet from the ground. In other words, the requirement of the ordinance of February 4, 1884, that appellee should use 30-foot poles, required it, in the case of Rathbone avenue, to overbuild, rather than underbuild. The same state of facts exists at almost every point of alleged interference as is thus shown to exist on Rathbone avenue. That is to say, appellee was obliged for a certain distance to be on the same side of the street with appellant because of the instructions of the city electrician, and it was obliged to overbuild, rather than to underbuild, because appellant had made use of poles only 30 feet long, 5 feet of which were underground.

Appellant complains that one of the dangers resulting from the overbuilding of its wires by the wires of appellee is that some wire of appellee is liable to break and fall down and come in contact with the appellant's wires; but, as we understand the evidence,

such contact between the wires of appellee and appellant, both being wires of low potential system, would be harmless, unless the same wire of appellee, at some other point in the city, should break and form a contact with a high potential wire, thus conveying the high potential current of electricity through the wire of appellee into the wire of appellant. In other words, one of appellee's wires must first come in contact with a high potential current of electricity at some place in the city, and, while that contact continues, the same wire of appellee must fall, and come in contact with some wire of appellant at a point where appellee's wires overbuild those of appellant. Thus, in order to produce the danger anticipated by appellant from the contact in question, two accidents must happen—one, that at some place in the city appellee's wire breaks and comes in contact with a high potential current; and, second, that when appellee's wire is so charged with such high potential current, it will break and fall upon the wire of appellant where it overbuilds the latter. The probability of these two accidents happening at the same time is too remote and uncertain to justify the issuance of an injunction against such overbuilding by appellee.

Complaint is also made that at street crossings or intersections appellee's wires would become interlaced with the wires of appellant. It is manifest that, where one street crosses another and upon both sides of both streets are poles and wires carrying both low and high potential currents of electricity, the wires must necessarily cross each other, and overbuilding and underbuilding become absolutely necessary. There is no evidence in this record that any system of wires in Aurora has ever interlaced with any other system, either of appellant or appellee, or any other system of either a high or low potential current. The evidence tends to show that at intersections where the poles of appellee crossing the poles and wires of appellant were of the same height as the poles of appellant, appellee's wires were inclosed in cables, and crossed the wires of appellant at these points in such cables several feet below the wires of appellant. In this way the danger of interlacing has been avoided.

A further contention is that appellee has erected two or three "distributing poles," as they are called, in the business district of the city, on one side of a certain street or streets, and from the top of these poles has extended drop wires to high buildings on the opposite side of such street or streets for the purpose of extending its wires, so as to reach the business places of its subscribers; and that such drop wires will be likely to sag and fall down over the high potential wires on the opposite side of the street or the high potential trolley wires, and thus come in contact with the wires of appellant. The evidence shows that these drop wires are placed so far above the wires of appellant, at a distance at some points of some 10 or 15 feet, that they could not sag or bend enough to reach appellant's wires directly below the tops of the distributing poles of appellee. It appears, however, that if there was a possibility of such a result, it could be avoided by the placing by appellant of a system of "guard wires," as they are called, directly above its top wires, extending from one pole to another, so as thereby to secure protection against contact, by means of sagging, between the wires of appellant and the wires of appellee. There is evidence tending to show that appellant refused to make use of these guard wires, or to permit appellee to place them in the proper position. It also appears from the evidence that appellee, in most cases where it has wires dropped from the street to the houses of subscribers, uses what is known as a "double-twisted, duplex, insulated, hard drawn, copper wire," and that this insulation, in case of contact between one of the drop wires and some high potential wire and also a wire of appellant, would protect appellant from receiving the high potential current of electricity from the high potential wire. It is true that this insulation does not always secure the protection desired, but that a high potential current of electricity will pass through the insulation on wires is a mere possibility, and not a probability. It must also be observed that the buildings into which the wires enter are protected to a large extent by the use of what is known as "fuses." A fuse is a piece of wire about six inches in length, made of very soft material, which melts when it comes in contact

with a high potential current of electricity. It appears from the evidence that the wires of appellant are fused before they enter the houses of its different subscribers, so that, if a high potential current of electricity is conveyed to the wires of appellant, it is prevented from entering the building or switchboard at its central station by a double system of fuses, and is prevented from entering the building of a subscriber by a single fuse. It is true, as is shown by the testimony, that sometimes a high potential current of electricity has been known to jump one of these fuses without melting it, but the happening of such an occurrence, while possible, is not probable.

The ordinance of August 7, 1899, under which appellee has placed its poles and wires in the streets of the city, provides, in section 2 thereof, that:

"All such line or lines or other electrical conductors shall be placed in underground conduits within the 'fire limits' district, and outside said 'fire limits' district the said Northwestern Telephone Company may erect, maintain and operate a system of poles, wires and cables for the transmission of sound, signals and intelligence in all the streets, avenues, alleys and other public ways in said city of Aurora."

But section 3 provides:

"That the said Northwestern Telephone Company, its successors and assigns, shall for the purpose of reaching and connecting its subscribers have the right to bring said wires, cables or other electrical conductors to the surface in every block located within the 'fire limits' district, and maintain the same on such poles as may be necessary to accomplish said purpose: provided, however, that in no case shall any wire, cable or other electrical conductor be carried over ground beyond the limits of the block within which they are brought to the surface."

The distributing poles in question were located at the points where the underground wires of appellee emerged from its underground cable, and the location of these poles by the appellee was made under the direction of the city electrician and the chairman of the street and alley committee. The evidence tends very strongly to show that these poles were so located and constructed, and the drop wires from them so extended, as to secure as great

safety as possible, and to avoid as much as possible the danger of contact, by sagging or otherwise, with appellant's wires, or the wires of any of the other systems in the street.

The appellant also complains that in certain alleys where appellant has a line of poles on one side of the alley appellee has constructed its line of poles on the opposite side at the same height, and that the drop wires from the tops of these poles of appellee, in crossing to the subscribers on the side of the alley occupied by the appellant, will pass through and interlace the wires of appellant. The proof shows that in such instances the appellee, in running one of its drop wires from the top of its pole to a subscriber on the side of the alley occupied by the appellant, runs such drop wire down its pole to a point lower than the lowest lead of appellant, and then from such point lower down on its pole runs its drop wire beneath the lead wire of the appellant on the opposite side of the alley. This leaves an abundance of clearance between appellee's drop wires and the wires of appellant. The course thus pursued is in accordance with the practice in such cases, and in accordance with approved telephone construction.

There is evidence showing that if, in extending its line of poles and wires along one side of a street, appellee should cross to the other side of the street, in order to avoid overbuilding appellant's wires, appellee would be obliged to make a bend in its line of wire in going from one side of the street to the other, and a second bend in continuing along the side of the street to which the crossing was made. According to the testimony, approved telephone construction requires that no more bends should be made in the wires than are necessary. In most cases where it is insisted by appellant that appellee should have crossed to the other side of the street, instead of placing its poles and wires on the same side of the street with appellant, appellee would have been obliged to place its wires directly above the high potential wires strung upon the opposite side of the street. The proof shows that it would be a violation of safe telephone construction to cross the street at such a point, and overbuild such high potential wires. The proof shows, also, that it is the common practice to overbuild systems

of low potential wires with other systems of low potential wires. Indeed, the second proviso of section 1 of the ordinance of September 6, 1881, which constitutes the appellant's authority to be in the streets of Aurora provides "that the city of Aurora may use said poles at any time for the purpose of fire alarm telegraph." Appellant was thus required by said ordinance to allow the city to use its poles for the purposes of a fire alarm telegraph. It is conceded that the fire alarm telegraph carries a low potential current of electricity, and thus, by the very terms of appellant's ordinance, two systems of low potential wires are allowed to be constructed upon the same line of poles. A "zone" has been defined to be an air space, so arranged that, in case of a breakage of any wire at any point, that wire would come in contact with a wire of another system, either by being blown against it, or by falling directly on it by weight of gravity. Where two leads of wires are said to be in the same zone, they are in that proximate relation to each other that a contact is possible between the two systems by falling wires. While we have been referred to no case by counsel where an injunction has been asked or granted restraining one low potential system of wires from using the same zone occupied by another low potential system, yet it cannot be presumed that the occupancy of the same zone by two low potential systems of wires is unlawful, in view of the fact that the practice of such occupancy is almost universally adopted in telephone construction. The record contains many instances where, in the city of Aurora, appellant has pierced and overbuilt lines of high potential wires. If appellant thus consents both to overbuilding and underbuilding in its relations with other companies constructing poles and wires in the streets of Aurora, it is difficult to see why it objects to the overbuilding of its line of wires on certain streets by the appellee. The proof tends to show that in constructing its lines the appellee has made use of safe and approved methods of construction, and that its construction, both as to its methods and location, has been approved by the city council of Aurora.

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On December 20, 1900, the city council of Aurora passed a second ordinance, the first and second sections of which are as follows:

"Section 1. That all the acts of the Northwestern Telephone Company, which have been by it done under the provisions of an ordinance of this city, passed by the city council on the 7th day of August, A. D. 1899, and approved by the mayor of this city, August 12, A. D. 1899, entitled 'An ordinance granting to the Northwestern Telephone Company certain rights in the city of Aurora,' and numbered 630, be and the same are hereby ratified, approved and confirmed by this council, and the license, grant, right and privileges by said ordinance granted to the Northwestern Telephone Company by name, are hereby expressly given and granted to the Northwestern Telephone Company, a corporation.

"Sec. 2. That in addition to such ratification of said acts of the said Northwestern Telephone Company and the regrant herein made to said the Northwestern Telephone Company, it is hereby ordained that permission and authority be and the same is hereby granted to the Northwestern Telephone Company, its successors and assigns, to construct, operate, maintain and repair," etc., its telephone system.

The original ordinance, granting the franchise to the company, is inserted in the same words as those used in the original ordinance, and the ordinance granting the second franchise was passed by a unanimous vote. At a meeting of the city council held on February 4, 1901, the following resolution was adopted unanimously, to wit:

"Resolved, that we hereby approve and accept of the location and construction of the lines of poles and wires of the Northwestern Telephone Company, . . . together with the location and construction of the two distributing poles," etc.

Even if it be true, as is charged by the appellant, that appellee did not in all respects follow the written permit executed to it by the committee on streets and alleys before it began the construction of its telephone system, yet such variation from the terms of the permit was cured by the subsequent approval of the city, and by the action of the appellee in obedience to the instructions of the city electrician and the committee on streets and alleys. The fee of the streets is in the city. Cities are given exclusive control over the streets and alleys within their corporate limits.

It follows, as a general rule, that a court of equity will not interfere with the city's control over the use of its streets, unless the exercise of such power by the city is abused to the oppression of persons or corporations having rights in the street, or unless the action of the city in such respect is fraudulent or grossly wrong and unjust. *Western Union Tel. Co. v. Guernsey & S. Electric Light Co.*, 3 Am. Electl. Cas. 425, 46 Mo. App. 120; *City of Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311; *Canal Com'rs v. Village of East Peoria*, 179 Ill. 214, 53 N. E. 633. There is evidence in the record tending to show that the appellant itself offered a joint occupancy of its poles by itself and other persons and corporations making use of the streets of the city for the purpose of conveying currents of electricity. While it is true that, in a certain sense, every case of overbuilding or underbuilding or joint occupancy is an interference, yet it is not necessarily an unnecessary and unreasonable interference. Appellant's right was not to operate its telephone system in Aurora free from any interference whatever, but so as to be free from unreasonable or unnecessary interference; or, in other words, such interference as would prevent the practical operation of its telephone system. After a careful examination of all the evidence, we are of the opinion that the construction of its poles and wires in the streets of Aurora for telephone purposes by the appellee has not been an unnecessary and unreasonable interference with the appellant's rights. Most of the dangers complained of by appellant are such as are necessarily incident to overhead construction which takes place when more than one telephone system occupy the streets of a city. Appellant has not shown that there has been any serious injury inflicted upon it by the appellee. The injuries of which it complains are problematic in character, and the dangers which it fears are remote and improbable. It is well settled that a court of chancery will not grant an injunction to allay the fears and apprehensions of individuals, and will only grant protection against acts which are not only threatened, but will in all probability be committed to the injury of the petitioner or complainant. 16 Am. & Eng. Ency. Law (2d

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ed.), pp. 360, 361. In *Western Union Tel. Co. v. Champlain Electric Light Co.*, 1 Am. Electl. Cas. 822, it was held that the courts will not interfere with the exercise by municipal authorities of their power to regulate the erection and maintenance of wires in the streets; that they will, however, in a proper case, as between two parties maintaining electrical wires in the streets, restrain the one which so places or uses its wires as to injure the other; but it was also held in the same case that the danger from breaks and falling wires during storms is so uncertain and indefinite that a court cannot take that into consideration in determining the question whether an injunction should be issued. In *Louisville Home Tel. Co. v. Cumberland Telegraph & Telephone Co.*, *supra*, it was said:

"Mere inconvenience will not afford ground for complaint. The injury must be grave, and unwarranted by the requirements necessary to such further exercise of the municipal authority in that direction as may be deemed expedient. The evidence in the record leaves no doubt whatever in our minds that the inconveniences likely to be suffered by the Cumberland Company in consequence of the proposed construction by the Home Company are comparatively trivial. The affidavits of experts and practical men show that the practice of constructing a system of lines by one company above the lines of another is very common in many cities, which are enumerated, especially where both are telephone systems; and no substantial inconvenience has been found to result. The city at all times has the power of regulation. It may not be arbitrarily exercised, but within reasonable bounds the city authority may rightfully designate in what manner the public interests require public services to be rendered, to the extent, at least, of determining in what part of a street the facilities shall be located; and presumptively this exercise of the police power is valid."

The writ of injunction will "not be issued upon the bare possibility of an injury, or upon any unsubstantial or unreasonable apprehension of it. The injury, too, must be real, not merely theoretical." *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 3 Am. Electl. Cas. 236.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

NORTHWESTERN TELEPHONE EXCH. CO. v. TWIN CITY TELEPHONE CO.

Minnesota; Supreme Court.

1. **PRIOR OCCUPANCY; EFFECT.**—In the absence of positive regulation by statute or ordinance controlling the construction of telephone lines in a municipality, the party first lawfully installing its lines acquires a superior right to erect poles and wires in streets which forbids a subsequent occupant for the same purposes to interfere therewith.
2. **NONINTERFERENCE BY SUBSEQUENT OCCUPANT.**—The prior lawful occupancy of urban streets by a telephone company will not necessarily create a monopoly of all the aerial space which it appropriates, but may give such occupant such substantial rights in the conduct of its business as may be required in the growth and extension of the same to meet the immediate demands of the public service subject to the right of the courts to restrain another telephone company from unnecessary interference therewith.
3. **INJUNCTION TO RESTRAIN UNLAWFUL INTERFERENCE.**—Under privileges granted by the city of Minneapolis, the plaintiff, in 1878, placed its poles and wires in its highways, and has from time to time maintained and extended the same to meet the necessary requirements of its business. In 1898, by authority of a charter from the city, the defendant crossed the lines of plaintiff upon poles at street intersections and placed its wires immediately thereunder, in such a manner as to interfere with the prior occupant in the necessary use of its franchise. Held, that such erection and maintenance of its poles and wires by defendant was an illegal impairment of the plaintiff's rights, which may be restrained by injunction.

(Syllabus by the court.)

Appeal by defendant from an order granting an injunction.
Decided June 12, 1903.

H. H. Potter, for appellant.

George D. Emery and *A. K. Wheeler* (*D. F. Morgan* of counsel),
for respondent.

Opinion of *LOVELY, J.*:

In this suit the Northwestern Telephone Exchange Company seeks to restrain defendant from alleged unlawful interferences with its lines and wires as previously established in the city of

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Minneapolis. The cause was tried to the court, who, upon findings of fact, held, as a conclusion of law, that the construction by defendant of its poles and wires under the wires of the plaintiff company as then maintained by the latter at the same places was an impairment of its rights, also that the defendant's use of a certain alley was improper, and ordered an injunction to restrain defendant from the continuance thereof. There was an extended presentation of the evidence, which is embraced in a settled "case," but it was conceded here that the findings of fact were sustained by the evidence. It is, therefore, only necessary to determine whether the conclusions of law thereon are well founded. The findings of fact are quite lengthy, and we shall only attempt to condense the results.

In 1878, the plaintiff, under the provisions of section 42, ch. 34, Gen. St. 1878, lawfully established its telephone system in the city of Minneapolis, and occupied its streets with lines strung upon cross-arms placed upon poles in the customary manner. Until the commencement of this action it has continued such occupancy, and extended its business so that it serves many thousand subscribers in the city, and connects its exchanges with outside cities and villages to such an extent that in the aggregate it has more than 4,300 miles of pole lines on which were strung 222,000 miles of wire within the State. In the construction of plaintiff's lines within the city, the poles vary in height from 30 to 70 feet, set firmly in the earth from 100 to 150 feet apart. At the upper end of the poles were attached cross-arms from 6 to 12 feet in length at intervals of 18 inches apart, each pole carrying from 2 to 12 of these cross-arms, on which were the wires. The erection of these poles and wires was authorized by the city under an ordinance which required previous application therefor directly to the city engineer, which ordinance is set forth and considered at length in *N. W. Tel. Ex. Co. v. City of Minneapolis*, 7 Am. Electl. Cas. 168, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175. In 1898 the Twin City Telephone Company, defendant, incorporated, and obtained from the city of Minneapolis the right to use its streets and alleys for the purpose of erecting its poles and wires therein. It so

placed its lines that in many instances at street crossings they intersected at right angles the lines of plaintiff immediately thereunder, of which rights and location defendant had ample notice. The relation of the poles, cross-arms and wires at the street intersections referred to are specifically designated by the court in its findings, but, in view of the conclusion we have reached, it is not necessary to refer incidentally to the distances between the several cross-arms and wires of the two companies as they are respectively maintained. It was found, however, that in repairing the plaintiff's lines and in adding new wires thereto the presence of the intersecting lines as maintained by the defendant rendered it more dangerous, difficult and expensive for the plaintiff to add to or replace its own lines, as is continually necessary in the conduct of its business, to its injury, which is impossible to estimate in damages; that in the use of the plaintiff's system as established and conducted in the city during the past ten years, the demand for its services renders it necessary continually to increase the number of its cross-arms and lines in the localities directly affected, and requires it at the present time to add many new cross-arms and wires below those actually constructed to supply the necessary demands of the public service, and to meet such requirements the plaintiff does not occupy any unreasonable amount of space for that purpose; also that it is the common practice and usage in the construction of telephone lines and wires in urban localities, whenever one line passes another at street intersections, for the party desiring to pursue that course subsequent to the location and use therein by a prior occupant, to be constructed above the lines previously established and maintained; that it is practicable, and would involve but slight additional expense, for the defendant to have constructed its lines by the use of higher poles at the points of intersection, and thus avoid interference with any part of the space appropriated by the plaintiff for its proper use, and that it is now practicable for the defendant to replace its poles at such places with higher poles in such a way that it will not interfere with its previous use, or with the usual or necessary extension of its business; that such a course had actually been adopted and put

in practice at many places in the city by the plaintiff itself where it was required to cross the electric lines of the city railway as previously maintained by that company. It was further found that in certain instances the defendant had placed its wires in such a position as to come in actual contact with the poles, if not the wires, of the plaintiff, and that upon one alley defendant so placed its wires as to pass through the wires of the plaintiff's lines where the defendant's poles were higher than those of plaintiff in such a way that they touched and directly interfered therewith.

It ought not to be and is not the purpose of this court to adopt any rule that will give to a telephone company a monopoly of aerial space in the maintenance of its poles and wires to cut off and deny competition, and we are not inclined at this time to pass upon plaintiff's claim that by the erection of its poles it had acquired a right to all the space between the lowest cross-arms thereon above the highways which can be utilized for the erection and maintenance of wires without reference to immediate future necessity, the apparent requirements of its business, or the obvious demands of the public service; but upon the facts as found by the court it appears that the erection and maintenance of its poles and wires by defendant at the street intersections referred to are an undoubted interference with the practical conduct of its business by plaintiff and the useful and necessary enjoyment of its franchises, which ought not to be permitted. We cannot agree with the claim of defendant that this is a question entirely within the purview of the municipality, and not a subject for review by the courts. Whatever rights the plaintiff has acquired by previous occupancy superior to those of defendant are valuable and substantial, and by the strongest sanctions of the organic law should be protected.

There is nothing really new in the claim of plaintiff, for it rests upon principles that have always existed, and must always exist, where conflicts arise between the rights of those engaged in the service of the public, or between private persons; for no one has a right to use his own to the detriment of another. The rightful occupancy and enjoyment of privileges may not create a monop-

oly, but will endow the user with benefits which he has a right to rely upon, and to that extent have been recognized by the courts. As between two corporations exercising similar franchises upon the same street, priority, though it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, controlling them, so that each company may exercise its own franchise as fully as is compatible with the necessary rights of another's. But, where interference is unavoidable, the later occupant must give way. *Edison Electric Light & Power Co. v. Merchants' & Mfrs.' Electric Light, Heat & Power Co.*, 7 Am. Electl. Cas. 413, 200 Pa. St. 209, 49 Atl. 766, 86 Am. St. Rep. 712; *Paris Elec. L. & Ry. Co. v. Southwestern Tel. & Tel. Co.*, 5 Am. Electl. Cas. 262, (Tex. Civ. App.), 27 S. W. 902; *Bell Tel. Co. v. Belleville Elec. L. Co.*, 12 Ont. (Can.) 571.

While it is probable that a first constructing company might desire to secure rights to itself that would create a monopoly of space by erecting its poles to such a height as would render it impossible to go over its wires, neither the evidence nor the conclusions of the court show this to have been done by the plaintiff, and where a rivalry exists that creates such a situation the relative privileges of each occupant may be determined by statute or ordinance, and this seems to have been done in the present instance by the regulation that the poles and wires of the plaintiff be placed under the direction and approval of the city engineer; but the courts must, when necessary, so control the actions, and the relative rights of the parties as to protect each in the enjoyment of its franchises, recognizing, however, the benefits which accrue by reason of the prior occupancy.

In the disposition of this action we do not go further than to hold that to the extent of the use of its pole lines and wires at the street intersections, and in the alley referred to, there was an impairment of plaintiff's rights which justified its interference.

Order affirmed.

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LOUISVILLE HOME TELEPHONE CO. V. CUMBERLAND TELEPHONE
& TELEGRAPH CO.

U. S. Circuit Court of Appeals, Sixth Circuit.

1. **PRIOR OCCUPANCY; RIGHTS NOT EXCLUSIVE.**—Prior occupancy of a certain space in streets by a telephone company under a franchise granted by a statute or ordinance entitles it to the continued enjoyment thereof without substantial impairment. But its right is not exclusive. Its privilege must be exercised so as to give room to another company coming in under a power expressly reserved to the municipality.
2. **RIGHTS UNDER SUBSEQUENT FRANCHISE.**—The company subsequently granted a franchise may construct its system of wires above those of the prior company. Mere inconvenience because of such an arrangement will not afford ground of complaint. The injury thereby occasioned must be grave and unwarranted.
3. **MUNICIPAL CONTROL.**—The municipality may, within reasonable bounds, designate in what manner the public interests require public services to be rendered, to the extent at least of determining in what part of a street the facilities shall be located.

Appeal from U. S. Circuit Court for the Western District of Kentucky. Reported 111 Fed. 663; decided November 6, 1901.

This is an appeal from an order of the circuit court granting a preliminary injunction in a suit in equity brought by the Cumberland Telephone & Telegraph Company against the Louisville Home Telephone Company for the purpose of restraining the latter company from erecting or maintaining telephone poles and wires along the south side of Park avenue and the north side of Hill street, in the city of Louisville, within the limits of the space occupied by the complainant. 110 Fed. 593. The bill alleged that the complainant (who is here the appellee) was a consolidated company, the constituents of which were the Ohio Valley Telephone Company, a local company at Louisville, and another company bearing the same name as that assumed by the consolidated company. This last-named constituent was doing business in the State at large outside of the city of Louisville. The Ohio Valley Telephone Company was incorporated by an act of the Legislature of Kentucky approved April 3, 1886.

On the 17th of August the Common Council of the city passed an ordinance authorizing said company to use the streets of the city for the erection and maintenance of its lines. The ordinance contained this further provision: "Nothing in this ordinance shall be so construed as to give to the said telephone company, its successors or assigns, any exclusive right to erect poles, or to lay underground conduits, pipes, cables, conductors, or wires, in the streets, avenues, alleys, or sidewalks of the city of Louisville." The provisions

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of the ordinance were accepted by the company, and it proceeded to construct, and thereafter maintain, a telephone system in the streets of Louisville until June 27, 1900, when it was consolidated under the constitution and laws of Kentucky with the Cumberland Telephone & Telegraph Company, as above stated. Since that time the consolidated company has continued to maintain and operate the telephone system in the city under the power granted to the Ohio Valley Telephone Company and devolved upon the consolidated company by operation of law. Among the sets of lines so constructed and operated was one on the south side of Park avenue, extending from Sixth street to the alley between Fifth and Fourth streets, and another on the north side of Hill street, extending from Sixth street to the alley between Fifth and Fourth streets, upon each of which lines poles and cross-arms had been erected and numerous wires were strung.

Some time in 1900 the Louisville Home Telephone Company was incorporated under the laws of Delaware, and on November 5th of that year the Common Council of the city of Louisville passed an ordinance, entitled "An ordinance to provide for the sale of the franchise or privilege to construct, establish, maintain, and operate a telephone system in the city of Louisville," and containing the following provisions:

"Section 1. That there shall be sold to the highest and best bidder for a term of twenty years the franchise or privilege to construct, establish, maintain, and to operate a telephone system for public and private use in the city of Louisville, including the necessary conduits, subways, manholes, wires, poles, and other equipments, and also the right of way over, along, under, through, and in the streets, avenues, alleys, lanes, parks, squares, bridges, and other public places in said city, for the purpose of running the subways, manholes, poles, wires, and other equipments necessary to construct, establish, maintain, and operate said telephone system in the city of Louisville in accordance with the conditions, terms, and limitations of this ordinance."

"Sec. 5. That any person, firm, or corporation owning or exercising such franchise or privilege may assign or transfer the same, but it shall not be assigned or transferred, directly or indirectly, in whole or in part, or for the benefit of the owner or owners of any competing telephone system operating in the city of Louisville."

"Sec. 6. That the said telephone system shall be located and constructed in the public ways and places in the city of Louisville under the supervision of the board of public works."

"Sec. 14. That the franchise or privilege herein provided for shall not be construed as being in any way exclusive, or as preventing the general council of the city of Louisville from providing for the sale of similar franchises or privileges to other persons, companies, or corporations."

The Home Company became the purchaser at the sale of the franchise for the price of \$10,000. Desiring to construct lines, each of several squares in length, along Park avenue and Hill street, upon some portion of which the other company had, as above stated, already constructed its lines, the Home Company made application to the board of public works to locate its line

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in those streets. By resolutions of the board, duly passed, the Home Company was permitted to construct its pole routes along the north side of Hill street and the south side of Park avenue. That company proceeded to erect its poles accordingly, and in that portion of those streets which was already occupied by the other company, set its poles in the same line with those of the other company and run them up between the wires, 25 feet higher than those of the other company. The reasons which induced the location of the Home Company's poles and lines on the same route with that of the other company on this portion of the streets appear to have been mainly these: The only feasible place for setting the poles is by the side of the street at the curbstones. On the south side of Hill street that place was already occupied by the poles and wires of an electric light line, which, on account of the greater voltage required in that service, rendered the proximity of telephone wires not only dangerous to the system itself, but to the lives of those employed about them. On the south side of Park avenue there were no residences. The other company was located there, and for a distance of two or three poles there was an electric light line. On the north side of the avenue there were no electric lines, but the territory north of the street was filled with residences, and fine shade trees were standing by the side of the street, which would have to be mutilated if electric wires of any kind were strung there. Other reasons are suggested for the determination of the board of public works, but in the view taken of the case by the court here it is not necessary to detail them. The Home Company having erected its poles and cross-arms for the wires, the Cumberland Company filed this bill, alleging that by reason of the prior location of its poles, cross-arms, and wires, which covered a width of 8 feet, it was entitled to retain that space free from interruption; that, although the Home Company proposed to carry its poles 25 feet higher than its own, and string its wires some 20 feet or so higher than its own, such construction would be injurious to its rights, for the reasons that by the breakage of wires, which frequently happens, the lines above would fall down upon its wires and disturb its operations; that the poles would abrade its wires and cables and destroy their insulation; that its workmen would be imperiled while making additions or repairs, and that it intended to extend its own lines upward and would require the space above.

Affidavits were filed in support of the averments of the bill, and upon these (the bill and affidavits) the motion for a preliminary injunction was brought on. The Home Company filed affidavits controverting the grounds on which substantial injury would be likely to result to the complainant from the intended construction, offering to provide means for insulating complainant's wires and cables from the structures of the Home Company, and averring that it had tendered the choice of location for the wires, whether above or below, to the complainant, which offer had been rejected. Upon the hearing, the court made the following order, granting the injunction prayed: "In consideration thereof it is now adjudged and decreed that until the further order of court it [defendant] be, and it is, restrained and enjoined from erecting or maintaining any poles or cross-arms, or stringing any wires thereon, any

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of which shall encroach on a space of the breadth of 8 1-2 feet, which space is the line of telephone poles of complainant on the south side of Park avenue between Sixth street and the first alley west of Fourth street, and the north side of Hill street from Sixth street west [east?] to the first alley west of Fourth street." From this order the defendant appeals.

Helm Bruce, for appellant.

David W. Fairleigh, for appellee.

Opinion by SEVERENS, Circuit Judge:

This being an appeal from an interlocutory injunction, we are required, in making our determination, to recognize the rule, which we have announced and applied in several previous cases, that we should not disturb the order unless the lower court has manifestly fallen into some mistake of law or fact material to its decision. *Garrett v. T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472; *Proctor & Gamble Co. v. Globe Refining Co.*, 34 C. C. A. 405, 92 Fed. 357; *Thomas G. Plant Co. v. May Co.*, 44 C. C. A. 534, 105 Fed. 375, 379. The Circuit Court appears to have accepted as correct the contention of the complainant that, by its prior occupation of the space which it occupied by erecting its poles, cross-arms and wires over a width of eight feet and at the height of twenty-five feet, it acquired an exclusive right to occupy that width of space from the ground upward without limitation, and this without any intrusion by another party; for the order must be construed by reference to the fact that the intrusion which the defendant was charged with intending to make when the injunction was moved for was that of stringing its wires above and out of contact with the structures of the complainant. In this the court misconceived the nature and extent of the rights of the complainant. It may properly be conceded that its prior occupation of space under the franchise granted by the statute and ordinance would entitle it to the continued enjoyment thereof, so long as it continued to perform its obligations, without substantial impairment. But its right is not absolutely exclusive. It is subject to such incidents as result from the exercise of the rights of other

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parties who have acquired a valid franchise of similar character. It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant. For the property right of the first is not to a monopoly. It is bound to exercise its privilege in such a way as to give room to another coming in under the power reserved. In the present case the common council of the city expressly reserved the authority to grant to others, if it should deem it for the public interest, the same privileges in its streets as it granted to the complainant. Its determination that it was expedient to grant the Home Company the same privilege it had granted to the Ohio Valley Company cannot be gainsaid, and the old company is bound to recognize the newcomer and grant all reasonable accommodation. Upon principle it may be doubted whether the first company could block the way in any of the streets so as to prevent the possible exercise of the power reserved to the common council.

It is not intended, of course, to say that the first occupant may be despoiled, or the substance of its right appropriated. But this does not happen from merely giving place to a rival company, whose presence was expressly stipulated for by the contract, nor, probably, if the presence of the new party was the result of the exercise of a power reserved by implication in such a grant of privileges. The distinction between the actual invasion of the property of a former licensee engaged in supplying public utilities and those incidental consequences which result from the authorized exercise of the privileges granted to a subsequent licensee for similar purposes was pointed out in an elaborate opinion by Judge BROWN, now a justice of the Supreme Court, in *Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co.* (C. C.), 3 Am. Electl. Cas. 408, 42 Fed. 273, 12 L. R. A. 544, where the authorities are collated.

Mere inconvenience will not afford ground for complaint. The injury must be grave and unwarranted by the requirements necessary to such further exercise of the municipal authority in that direction as may be deemed expedient. The evidence in the record leaves no doubt whatever in our minds that the inconveniences likely to be suffered by the Cumberland Company in consequence of the proposed construction by the Home Company are comparatively trivial. The affidavits of experts and practical men show that the practice of constructing a system of lines by one company above the lines of another is very common in many cities which are enumerated, especially where both are telephone systems, and no substantial inconvenience has been found to result. The city at all times has the power of regulation. It may not be arbitrarily exercised, but within reasonable bounds the city authority may rightfully designate in what manner the public interests require public services to be rendered, to the extent, at least, of determining in what part of a street the facilities shall be located, and presumptively this exercise of the police power is valid. Its right to do this was not surrendered by the city when it made the grant of the franchise to the Ohio Valley Company. The power in this instance was delegated to the board of public works, and there is an entire lack of proof that the board acted arbitrarily, or without due regard to the rights acquired by the Cumberland Company. *Com. v. City of Boston*, 97 Mass. 555; *Chicago, St. L. & N. O. R. Co. v. Louisville & N. R. Co.* (Ky.), 53 S. W. 799; *Gay v. Telegraph Co.*, 1 Am. Electl. Cas. 427, 12 Mo. App. 485; *Michigan Tel. Co. v. City of Charlotte* (C. C.), 7 Am. Electl. Cas. 52, 93 Fed. 11, and the authorities there cited. Besides, it follows from the conditions we have noted that there was no grave danger to be apprehended at the time this bill was filed. The poles of the Home Company had been already erected and the cross-arms put on. No action appears to have been taken until after this was done. There appears no such impending danger of injury to the complainant from the stringing and maintenance of the wires pending the suit as would justify the inter-

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ference of the court before the final hearing and anticipating the entire purpose of the bill. *Blount v. Societe Anonyme du Filtre, etc.*, 3 C. C. A. 455, 53 Fed. 98 (per JACKSON, J.).

The order granting the preliminary injunction must be reversed, with costs.

Interference by one company with rights of another.—In the case of *Cumberland Teleph. & Telep. Co. v. Louisville Home Teleph. Co.*, 24 Ky. Law. Rep. 1676, 72 S. W. 4, both of the contending parties were exercising franchises for the use of the streets by virtue of ordinances of the city of Louisville, neither of which were exclusive. The old company, whenever the new company erected its poles in the streets of the city, changed the location of its poles and erected them alongside of, and at practically the same height as those of the new company, thus preventing the new company proceeding with its operations. The new company, the Home Telephone Co., was granted an injunction restraining the Cumberland Co. from further interference. The Court, per HOBSON, J., said:

"On the merits of the case we have little difficulty. Appellant's franchise was not exclusive. Its prior occupation of a particular space entitled it to the continued enjoyment of that space without substantial impairment by appellee; but this enjoyment is subject to such incidents as result from the exercise of the rights of appellee under its franchise, for it is necessarily implied in the grant to appellee that it is subject to such limitations as will enable another to enjoy a like franchise. Otherwise the right of the first company obtaining a grant would amount to a monopoly. This was not intended. The grant to appellant is like other privileges in the public ways. It must be exercised in such a way as not unduly to interfere with the rights of others. The substance of its rights cannot be appropriated by another, but there is no reason why two telephone companies cannot operate on the same side of the street; and, from the proof in this case, it is not only common, but much better than to have them on different sides, when there are electric light lines on the street, or other wires carrying heavy currents of electricity. The city authorities may rightfully determine in what manner the streets may be used, and to what extent, and when, structures may be erected in them; and, within reasonable limits, to fix the space to be occupied by rival telephone lines. Of course, there must be no substantial impairment of appellant's property rights, but mere inconvenience must be endured by it, just as by all others, in the enjoyment of the public utilities of the city. After a careful reading of the record, we are unable to see that any substantial injustice was done appellant by the chancellor's judgment. On the contrary, it seems to us to have been in accordance with the real equity of the case."

Rights of prior occupant.—A municipal corporation, having contracted with an electric light company for lighting its streets, and the company in reliance thereon having expended money and erected its poles and strung its

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wires with the consent and under the direction of the municipal authorities, cannot infringe the rights which the company has thus acquired, or permit another company to infringe them. Although the company first in occupation does not obtain an exclusive right to maintain its line in a street, yet the rights of a subsequent occupant are subordinate and must be exercised in such a manner as not to interfere with the rights of the prior occupant. *Rutland Elect. L. Co. v. Marble City Elect. L. Co.*, 4 Am. Electl. Cas. 256, 65 Vt. 377, 26 Atl. 635. A company which, with municipal authority, first occupies a reasonably sufficient space for its electrical appliances, thereby acquires the right not to be molested in its possession. *Consolidated Elect. Co. v. People's Elect. L. & G. Co.*, 4 Am. Electl. Cas. 250, 94 Ala. 372, 10 So. 440 (citing *Nebraska Teleph. Co. v. York Gas. & Elect. L. Co.*, 3 Am. Electl. Cas. 364, 43 N. W. 126; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 2 Am. Electl. Cas. 152, 33 Fed. 659).

Interference with trolley system.—A telephone company is bound to place its wires at such a height as not to interfere by contact with a trolley wire used by an electric street railway company. This is so both on common law principles, and by a statute requiring telephone companies to so use the streets and highways as not to discommode the public use for purposes of travel, which includes travel by electric railway. *Central Pa. Teleph. & Supply Co. v. Wilkesbarre & W. S. Ry. Co.*, 4 Am. Electl. Cas. 260, 11 Pa. Co. Ct. R. 417.

In the case of *Hudson River Teleph. Co. v. Watervliet T. & Ry. Co.*, 4 Am. Electl. Cas. 275, 135 N. Y. 393, 32 N. E. 148, a leading case upon this subject, it was held that a telephone company, though first in the occupation of a street, has no equity prior to a street railway company, subject to whose rights it expressly obtained its franchise. This is true in any event since the railway is and the telephone is not a primary street use. A telephone company's franchise being subject to rights of public travel, and the use of the streets by the railway being in aid of travel, the latter company cannot be compelled to avoid injury to the apparatus of the former, caused by induction, by the use of more expensive and dangerous and less useful appliances.

But a somewhat different question is discussed in the case of *State ex rel. Wisconsin Teleph. Co. v. Jonesville St. Ry. Co.*, 4 Am. Electl. Cas. 289, 87 Wis. 72, 57 N. W. 970, where the defendant street railway company was compelled by mandamus to place guard wires at such points as its wires crossed the wires of the plaintiff, it appearing that the telephone company was the prior occupant; that the apparatus and employees of the telephone company were in constant danger; that guard wires were an effective remedy; and that they were required by city ordinance, which the defendant had neglected to obey. See also *Cumberland Teleg. & Teleph. Co. v. United Elect. Ry. Co.*, 4 Am. Electl. Cas. 297, 93 Tenn. 492, 29 S. W. 104, where the action was brought to recover sums expended by the telephone company in obviating the dangers from induction, conduction and contact of wires, and it was decided as to the two last the plaintiff could recover, but could not as to induction. This case contains a very elaborate and interesting discussion of

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the whole question. A case had formerly arisen between these same parties (3 Am. Electl. Cas. 408, 42 Fed. 273) whereby the telephone company sought an injunction to restrain the railway company from interference with its lines, but the injunction was refused. An interesting English case (*National Teleph. Co. v. Baker*, L. R. 2 Ch. Div. 186), pertaining to the question is reported in full in 4 Am. Electl. Cas. 320.

Interference between electric light and telephone wires.—A telephone company having a franchise to occupy streets in the manner it was doing, superior in point of time to that of an electric light company, is entitled to an injunction restraining the latter from stringing its wires in such proximity to those of the telephone company as to impair the efficiency of its service. *Paris Elect. L. & Ry. Co. v. South Western Teleg. & Teleph. Co.*, 5 Am. Electl. Cas. 262 (Tex. Civ. App. 1894). And see *Western Union Tel. Co. v. Los Angeles Elect. Co.*, 6 Am. Electl. Cas. 202 (U. S. Circ. Ct. Cal. S. D.)

As between two electric light companies, each having permission to use the streets, and each furnishing commercial and domestic lights to citizens, but one only having a contract with the city to light its streets and public places, the company having such contract, though later in occupation of the streets, has the paramount right, and when the poles and electrical appliances of the two companies interfere, the company doing only private lighting must yield. *Terre Haute Elect. L. & P. Co. v. Citizens' L. & P. Co.* (Ind. Super. Ct.) 6 Am. Electl. Cas. 193.

CORPORATE MORTGAGES.

AMERICAN LOAN & TRUST CO. v. GENERAL ELECTRIC CO.

New Hampshire; Supreme Court.

POWER OF ELECTRIC LIGHT COMPANY TO MORTGAGE ITS FRANCHISES.—An electric light and power company organized under a general statute, having a franchise from a city for the use of its streets for constructing and erecting wires and poles, may mortgage its property and secondary franchises without the assent of the Legislature, notwithstanding the fact that it is a *quasi* public corporation.

Bill in equity by the American Loan & Trust Co. to restrain the General Electric Co., a judgment creditor of the Concord Electric Co., from completing a levy on property of the latter company mortgaged to the trust company. Case dismissed. Reported 71 N. H. 192, 51 Atl. 660; decided July 5, 1901.

Streeter & Hollis, for plaintiff.

Johnson, Clapp & Underwood, for defendant.

Opinion by CHASE, J.:

The power of private corporations generally to secure the payment of their debts by a mortgage of their property is not denied; but it is alleged that the Concord Electric Company is a *quasi* public corporation, and, being such, cannot mortgage or otherwise alienate its franchises and the property required for the performance of its public duties without the assent of the Legislature. According to the weight of authority, measured by the number of the cases, *quasi* public corporations have this disability. 4 Thomp. Corp. secs. 5352, 5355, and authorities cited. Whether the reasons upon which the doctrine rests are sufficient to support it has been seriously questioned. 3 Cook Corp. 1782a; *Miller v. Railroad Co.*, 36 Vt. 452; *Shepley v. Railroad Co.* 55 Me. 395, 407;

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Kennebec & P. R. Co. v. Portland & K. R. Co., 59 Me. 9; *Hunt v. Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006. The doctrine has been approved in this State in respect to railroad corporations. *Pierce v. Emery*, 32 N. H. 504; *Richards v. Merrimack & C. R. R.*, 44 N. H. 127; *State v. Hayes*, 61 N. H. 264, 324. Whether the secondary franchises of a quasi public corporation—the franchises other than that of being a corporation—and the property required for the fulfilment of the public purposes of the corporation may be mortgaged depends upon the terms upon which the franchises are granted, “or, in the absence of anything special in the grant itself, upon the intention of the Legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the State.” *Hall v. Railroad Co.*, Fed. Cas. No. 5,948. The Concord Electric Company was formed under the general law of the State. This provides that any five or more persons of lawful age may associate together by articles of agreement to form a corporation for certain specified purposes, and for “the carrying on of any lawful business except banking, life insurance, the making of contracts for the payment of money at a fixed date or upon the happening of some contingency, and the construction and maintenance of railroads.” Pub. St. ch. 147, sec. 1. When the articles are recorded as required, and the charter fee, if any, is paid, the signers become a corporation, “and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of other similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.” Id., sec. 4. Among the powers expressly granted to such corporations is the power to make “contracts necessary and proper for the transaction of their authorized business,” and to “purchase, hold and convey real and personal estate necessary and proper” for such purpose, not exceeding the amount authorized by their charter or by statute. Id., ch. 148, secs. 8, 9. One reason that has been

assigned for the non-vendibility of a *quasi* public corporation's franchises and property without the special assent of the Legislature is that the State, in granting the corporate powers, relies more or less upon the ability and character of the persons to whom the grant was made for accomplishing the public purposes in view. If this is a sound reason in any case (*Miller v. Railroad Co.*, 36 Vt. 452, 492; *Shepley v. Railroad Co.*, 55 Me. 395, 407; 4 Thomp. Corp., sec. 5352), it certainly is not in the case of a corporation formed under the general law of this State. The State has no part in determining who the members of the corporation shall be, other than that they shall be of lawful age. Any five persons of lawful age may become a corporation by force of their own acts in making the agreement, causing it to be recorded, and paying the required charter fee. After the corporation is organized, and its capital stock is paid in, the stockholders are liable to constant change by transfers of stock in various ways. The grant of corporate powers under these circumstances is not in any sense a personal trust. *Threadgill v. Pumphrey*, 87 Tex. 573, 578, 30 S. W. 356. The only special privilege which the Concord Electric Company acquired by its incorporation was the right to be a corporation. The power of *eminent domain* was not delegated to it, it was not exempted from taxation, nor was it granted a monopoly of furnishing electric lights to the city and its inhabitants. It was granted no other or greater power in respect to its proposed business than a natural person would have in the prosecution of the same business. It acquired the right to construct lines of wire in highways of the city not by virtue of its incorporation, but by virtue of licenses granted by the mayor and aldermen. The statute provides that "telegraph, telephone, electric light and electric power poles may be erected and maintained in any public highway, and the necessary wires may be strung on such poles or placed beneath the surface of such highway by any person or corporation as provided in this chapter, and not otherwise." Pub. St. ch. 81, sec. 1. It further provides that the selectmen, or, in case of a city, the mayor and aldermen (*Id.* ch. 48, sec. 14), upon petition of any person or corporation, may,

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locate the routes of lines of wire and grant licenses therefor for such a period of time as they deem expedient, may change the terms and conditions of the licenses from time to time, and may revoke the same whenever the public good requires. If a person is damaged in his estate by a license or any act done under it, he may have his damages assessed by the selectmen. Appeals from the decisions of selectment to the Superior Court are allowed in certain cases. *Id.* ch. 81, secs. 2-9. These provisions were designed to regulate and control the use made of highways for such purposes, so that such use will not unduly interfere with the other public uses to which the highways are dedicated. A license under these provisions is not a grant of a franchise, but a mere permission to use highways, subject to limitations and constant control and regulation by public officers. *People v. Gaslight Co.*, 38 Mich. 154, 155; *Commercial Electric Light Co. v. City of Tacoma*, 17 Wash. 661, 672, 50 Pac. 592. So far as the operation of the provisions is concerned, it does not matter who the licensee may be for the time being. If a license was granted to the Concord Land & Water Power Company, and the Concord Electric Company, as the vendee of the property, rights and franchises of that company, is now operating the electric light plant, its use of the highways may be regulated and controlled under these provisions, the same as if there had been no change in the ownership of the plant. If the transfer of the property had the effect to revoke the license, the statute provides a way for obtaining a renewal. *Id.* ch. 81, sec. 18.

The statute further provides that "all telegraph, telephone and electric light companies serving parties for hire shall be deemed to be public, and shall reasonably accommodate persons wishing to enjoy their facilities without discrimination and at reasonable rates." Pub. St. ch. 81, sec. 13. In the original act, of which chapter 81 of the public statutes is a revision, the corresponding provision relating to electric light companies reads as follows: The "proprietors of any electric lighting apparatus or lines shall furnish the means of lighting by such electric light to all persons within reach thereof and applying therefor upon similar terms

and conditions without discrimination and at reasonable rates." Laws 1881, ch. 54, sec. 12. The words "electric light companies" in the revised section were evidently intended to describe the same parties as the words "proprietors of any electric lighting apparatus or lines" in the original section, and to include natural persons as well as corporations. This provision imposes certain duties in behalf of the public upon the corporation or natural person engaged in the business of furnishing electric lights for hire and making use of highways in the business. By virtue of it, and also in consideration of the license to make use of highways, the corporation or natural person assumes an obligation to the State to carry on the business faithfully and impartially so far as the public are concerned. While the obligation is personal so long as the corporation or person holds the property used in its performance, it passes with the property to a vendee, and must be assumed by the latter. The Concord Electric Company is under the same obligation to furnish electric lighting facilities to the public at reasonable rates and without discrimination as was the Concord Land & Water Power Company. It succeeded that company in the business and the ownership of the plant, and the statute now applies to it the same as it formerly did to the Water Power Company. The State relies for a fulfilment of the public purposes in view, not upon its confidence in particular persons, but upon statutory provisions defining the duties of persons engaged in the business and regulating their conduct. Although a corporation or a person becomes incapacitated for performing the public duties and obligations pertaining to the business by disposing of the property and franchises used in it, the public purposes are not thereby defeated. All the public duties and obligations pertaining to the business follow the property and franchises into the possession of whosoever they go, and attach to their owners for the time being. Under these circumstances public policy does not require that such corporations should be disabled from alienating their property and franchises.

But there is another consideration that seems conclusive. A natural person may engage in the business of furnishing electric

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lights for hire, and acquire all the privileges and be subject to all the duties and obligations pertaining to the business as provided in the statute. There can be no doubt that a person so engaged is at liberty to dispose of his business and property at pleasure. The fact that the Legislature have placed a corporation engaged in the business of electric lighting upon the same footing in all respects as a natural person shows that they understood and intended that a corporation of this kind should have equal freedom as to the disposition of its property and rights. It is not difficult to see why the Legislature adopted this course. A policy that would deprive an electric light corporation of the power of selling out its business and property when it becomes financially embarrassed, or of raising money to carry on the business by a pledge of its property and franchises, would tend to defeat the fulfilment of its public purposes. A corporation so hampered might be worse than useless to its stockholders and the public. It might not be able either to use its property and franchises, or to transfer them to others for use. "It is said, if a corporation is permitted to dispose of its franchises and of its property essential to their exercise, it will disable itself from performing its obligations to the public. It might seem to be an answer in point that, unless it is permitted so to do, it will never have any ability to perform those obligations." *Miller v. Railroad Co.*, 36 Vt. 452, 491. Nor is it apparent how unsecured creditors of a corporation could avail themselves of the property and franchises to pay their debts. The policy that would disable the corporation from pledging its property and franchises for its indebtedness would prevent them from being taken by judgment creditors upon a levy. 4 Thomp. Corp. sec. 5364; 6 Thomp. Corp. sec. 7853. All the supposed evils attending the substitution of another person or corporation for the original corporation would arise if the property and franchises were transferred by a levy, the same as if they were transferred by the foreclosure of a mortgage or by a sale. For example, how would the public be any better off by a transfer of the Bridge street station and its apparatus—property that is indispensable to the business—to the General Electric Company by a levy than

it would be by a transfer to other persons upon a foreclosure of the mortgage to the American Loan & Trust Company? The right to sell or pledge property is one of the principal rights pertaining to ownership, and one that is generally essential to enable the owner to use the property in business successfully. The policy adopted by the State, so far as electric light corporations are concerned, allows this right to remain unimpaired, and secures the assurance that corporations will fulfill their public duties by providing for a regulation of their use of the property. It regards mortgages of the property and franchises of such corporations, made to secure debts incurred in their authorized business, as contracts or conveyances "necessary and proper for the transaction of their authorized business," as well as necessary and proper for the fulfilment of their obligations to the public.

There are general laws which expressly authorize railroad corporations and street railway corporations to incur debts and secure their payment by mortgages of their property and franchises. Laws 1897, ch. 71, sec. 1; Laws 1895, ch. 27, secs. 16, 17; Laws 1897, ch. 74, sec. 1. During the past ten years fourteen electric light companies have been incorporated in this State by special charters, and each of them was expressly authorized to mortgage its property and franchises. Laws 1893, chs. 201, 227, 273, 303; Laws 1897, chs. 144, 172, 173, 184, 202, 203, 206; Laws 1899, chs. 208, 218; Laws 1901, ch. 243. Five acts have been passed authorizing the consolidation of electric light companies, each of which expressly gave the consolidated corporation like authority. Laws 1897, ch. 137; Laws 1899, ch. 164; Laws 1901, chs. 189, 195, 276. The charters of three corporations previously granted have been amended by introducing into them authority of this kind. Laws 1893, chs. 177, 193, 301. It is said by the defendants upon their brief that of ninety-eight special charters granted by the Legislature since 1887 to gas, electric light, electric railway, water, aqueduct, telephone and telegraph companies eighty have contained authority to mortgage the corporation's property or property and franchises. This legislation all tends very strongly to prove the existence of a public policy in this State

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which allows *quasi* public corporations—even railroad corporations—the same freedom to incur debts and pledge their property and franchises therefor that is possessed by other corporations and by natural persons. Whatever the public policy may be in respect to other corporations, no doubt is entertained that it allows electric light and power corporations, formed under the general laws, and making use of public highways for stringing wires under licenses granted by selectmen, to alienate or mortgage their property and secondary franchises. Accordingly it is held that the Concord Electric Company has power to mortgage its property and franchises. In other States similar views have been taken under similar conditions. *City of Detroit v. Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039; *Hunt v. Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006; *Hays v. Coal Co.*, 29 Ohio St. 330; *Evans v. Heating Co.*, 157 Mass. 37, 31 N. E. 698.

Case discharged. All concurred.

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MUNICIPAL CONTROL.

BAXTER SPRINGS, CITY OF, v. BAXTER SPRINGS LIGHT & P. CO.

Kansas; Supreme Court, Div. No. 2.

1. **ORDINANCE ACCEPTED CONSTITUTES CONTRACT.**—An ordinance of a city, duly passed and published, conferring certain privileges and imposing certain duties upon an electric light company, which, under the charter of the city, it had power to confer, the terms of which ordinance were accepted by the company as therein provided, constitutes a contract between the city and such company, binding upon both.
2. **PROOF OF ACCEPTANCE.**—To show its acceptance of the terms of such an ordinance, the company may introduce a written receipt, signed by the city clerk, that a written acceptance of the terms thereof had been left with him; the ordinance itself providing that the company should file with the city clerk of the city a written acceptance of the terms thereof within a given time.
3. **DESIGNATION OF NUMBER AND LOCATION OF LAMPS.**—An ordinance provided that the company should furnish, at a price therein named, as many lights as the city may order, to be located where it should order, within certain limits. *Held*, that such order need not be expressed in the form of an ordinance, although the charter of the city provides that it can only contract by ordinance; the mere designation of number and location of lamps not being a contract.
4. **EXCUSE FROM PAYMENT.**—An infirmity in an executory contract which might be taken advantage of by its repudiation before execution will not avail to excuse from payment for benefits received thereunder after execution. This rule applies to a municipality as well as to an individual.

Error by defendant from judgment for plaintiff. Reported 64 Kan. 591, 68 Pac. 63; decided March 8, 1902.

W. R. Cowley, for plaintiff in error.

E. M. Tracewell and Blue & Glasse, for defendant in error.

Opinion by CUNNINGHAM, J.:

This was an action by the Baxter Springs Light & Power Company against the city of Baxter Springs to recover for electric

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light service furnished to the city upon its streets. After the issues were joined, the case was referred to a referee to make findings of fact and of law. This he did, and to several of these findings exceptions were taken and filed on the part of the city, which exceptions were nearly all overruled by the trial court, and judgment rendered for the company and against the city on the findings of the referee. The errors complained of arise out of the overruling of these exceptions. They will be considered in the order in which they were presented. The facts necessary to a proper understanding and discussion of them are as follows:

On December 20, 1888, the city council passed ordinance No. 52, by which the company was authorized to erect, operate and maintain a system of electric lights in said city. This ordinance also granted to it the right to use sufficient water power from a dam owned by the city across Spring river for the purpose of operating such light and power plant. The sections of the ordinance involved in this discussion are as follows:

"Sec. 3. That in consideration of the benefits to be derived by the said city of Baxter Springs by said company constructing and establishing said light and power plant, the said city of Baxter Springs hereby grants to the said company the right to use fifty (50) horse power to operate their machinery, provided there shall remain from the wheels now in and running at the dam, across Spring river, owned by said city, that amount of horse power over and above what said city already granted to Messrs. Allen Brothers, and Messrs. Willard and Morrison; if however, said wheels are found to be insufficient to furnish said power, then the grantees shall have the right to place a water-wheel in the west pit of the fore-bay and connect the same with the main shaft now in. It being agreed that said city assumes no liability or expense in putting in or maintaining said power; and in case it becomes necessary at any time, to repair the dam or any part thereof, or any appurtenances thereto; in order to maintain said power at said dam in running order, the said grantees agree to pay for said repairs, the ratio that their power bears to the whole of motor power used at said dam; also the said city of Baxter Springs hereby grants to said company the right to erect and maintain on their ground at or near the main shaft at said dam such buildings and make such connections as may be necessary to operate and carry on said light and power plant with the right of way to and from said ground."

"Sec. 6. In further consideration of the rights and privileges therein granted said grantees agree to furnish and maintain free of charge lights for the city hall, to be located and adjusted in such manner as shall fully light said hall for all kinds of entertainments and amusements, whether of public or private

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entertainment, conducted by said city or private individuals, by consent or authority of said city, and council chamber during the continuance of this franchise, said city to be at the expense of maintaining and keeping in order said lamps after they have been placed in position; also said grantee is to furnish said city as many incandescent lights as said city may order to be located by said city within one block of the lines of said wires whenever said city shall notify said light and power company that they desire the same, said lights to be put up and maintained during the existence of this franchise and whenever so ordered. Said city hereby agrees to pay said company, its successors or assigns, the following rates: Lamps of 16 candle-power, \$10.80 each per year; lamps of 29 candle-power, \$13.20 each per year; lamps of 32 candle-power, \$15.60 each per year. Payments to be made semi-annually on the first day of February and August of each year."

This ordinance was to go into effect after its publication, provided the company within five days after its passage should file with the clerk of the city its written acceptance of the terms thereof. The plant was erected and put in operation, so that by about April 20, 1889, it was ready for operation, and from that time until the last of the year 1892 the company furnished twenty-five sixteen candle power lights for the lighting of the streets, and received semiannual payments therefor as provided by section 6. There then arose a controversy as to whether the company was bound, under the ordinance, to furnish an all-night service, or only lights until 12.30 a. m., as it had been furnishing. There was no adjustment of this controversy between the parties, but the company continued to furnish lights as it had theretofore done, without objection on the part of the city, up to the time when this action was brought to recover compensation therefor under the terms of the ordinance. The principal controversy was as to whether the company was required to furnish an all-night light, or whether it was only required to furnish lights until midnight.

The exceptions filed by the city to the findings of fact went to the admissibility of various items of evidence offered by the company. It sought to establish its contract with the city, and for this purpose, having pleaded ordinance No. 52, it desired to show its written acceptance thereof as provided therein, and, to do this, introduced the following paper: "Baxter Springs, Kansas. December 22nd, 1888. Received from the Baxter Springs Light

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and Power Company their written acceptance of the terms of the electric light and power franchise ordinance passed December 20th, 1888. E. B. Corse, City Clerk." The reception of this paper by the referee is urged as error, and it is claimed that the written acceptance itself should have been introduced, instead of the written acknowledgment of its receipt; that, had such written acceptance itself been introduced, it might have shown some change of the terms of the proffered contract contained in the ordinance. We do not think that this claim is well founded. The ordinance itself provided that it might be accepted by the filing with the clerk of a writing indicating such acceptance. The receipt of the clerk was at least *prima facie* evidence that said writing had been filed with him; that the company had done what the ordinance required it to do to indicate that it had accepted the provisions of the same. It seems to be agreed that the receipt only indicates that the acceptance had been received by the clerk, not filed. Whether filed or not, makes no difference. The company could not file it. It had taken the written acceptance to the clerk, the officer which the ordinance indicated was the proper one with which to deposit the same. We think this evidence sufficient to sustain the referee's finding that the company had accepted the terms of the ordinance, and that out of such ordinance and its acceptance arose a contract.

The referee further found that out of the contract thus created grew the obligation on the part of the company to furnish as many incandescent lights as the city should order—such lights to be placed where the city should designate—for which it was to pay the company at the rate of \$10.80 per year for each sixteen candle power lamp, to be paid semiannually on the 1st day of February and August in each year. It is contended that this finding is unauthorized by the evidence, for the reasons: First, That in the original petition filed by the company the claim was made that the liability grew out of a verbal contract, and not out of a contract created by the passage of the ordinance and its acceptance, as set out in a subsequent amended one; and it is insisted by the

city that, inasmuch as the claim as originally made was that the contract was a verbal one, the amended petition could not change that issue. There is no merit in this contention. The office of an amended pleading is to restate matters incorrectly or inadvertently pleaded at first, so that the issues between the parties may be accurately stated, to the end that their rights be correctly ascertained. Second. It is further contended that, because section 6 does not specify the number of lights which were to be furnished, no contract was ever made for the furnishing of any, because the city could only speak as to the matter through an ordinance. The records of the city council show that on April 23, 1888, "it was ordered that twenty-five electric lights be put in on the streets, to be located by the committee on streets and alleys and the mayor." It is further shown by the oral evidence that the lights were put in in accordance with the directions of this committee and the mayor, but it is claimed that inasmuch as there was no showing made that this committee ever reported to the city council, or that such report was confirmed and ratified by the city council by ordinance or resolution, no contract was consummated for the putting in of these lights; and many authorities are cited in support of the proposition that contracts can only be entered into in the formal manner indicated. The correctness of this proposition we do not question. Its application to this case, we do. The contract was and is contained in the terms of the ordinance, and in this respect it was to furnish as many incandescent lights as the city should order. The number of lights, and their location within the limits prescribed by the ordinance, were to depend upon the order of the city, not upon further negotiation. The company had no option to do or to refuse to do. The number to be put in was not a matter of contract. Nothing further was required than the order of the city, and upon this order the company was bound to put them in. This order was properly expressed by the entry made upon the records.

It is further contended that the power to locate these lights, being a power to contract, must be exercised by the council itself,

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and could not be delegated. What we have already said disposes of this contention.

If we, however, should allow the correctness of the city's contention that no written acceptance of the terms of the ordinance was ever filed as provided therein, and that no specific contract as to the number of lights provided thereby was shown, still we might not adopt the conclusion that the light company could not recover for the want of a contract, because, over and beyond all this, it appears without question that the light company had proceeded to erect its plant, and had put in the lights as required; had furnished the same to the city, in its city hall and council chamber and upon its streets, for a period of three years, without objection or complaint in any manner whatever; and had carried out its part of the contract. This all being so, the city may not now question the regularity of this contract. A contract good enough to obtain benefits under is good enough to warrant a recovery of payment for such benefits. While the contract remained an executory one, the city might require its acceptance in accordance with its terms; but, when it has been executed on the part of all concerned, no such objection can be entertained. This rule of ordinary morals applies as strongly to a municipality as to an individual. *Waterworks Co. v. City of Columbus*, 48 Kan. 99, 28 Pac. 1097; *Green's Brice, Ultra Vires*, 729, note "a;" *Aurora Water Co. v. City of Aurora*, 129 Mo. 584, 31 S. W. 946.

Again, exceptions were taken to finding 8, which finding is that from December 1, 1892, to June 5, 1895, the company had maintained on an average of twenty-five lamps "according to the terms of said contract." The objection to this finding especially is that the contract required the maintaining of these lights for an all-night service, and not a half-night service, as was done. Considerable oral evidence was introduced before the referee as to what the understanding of the parties was at the time of the enactment of the ordinance in respect to this matter. It will be observed that the ordinance itself is silent upon this subject. It was competent, therefore, to offer oral evidence to show the intention of the parties relative thereto; and for this purpose the accept-

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ance and payment on the part of the city for such one-half night service from the date of its installation, in April, 1899, to December 1, 1892, was introduced. We think that such evidence was entirely competent for this purpose. Where a contract is ambiguous in its terms, a construction given to it by the parties thereto, and by their actions thereunder, is competent to explain their understanding of such contract. *Manufacturing Co. v. Cruzan*, 63 Kan. 411, 65 Pac. 647; Beach, Mod. Cont. sec. 721. As the referee found that a midnight service was in accordance with the contract, and as this was found upon conflicting evidence, and as the finding received the approval of the trial court, we may not set the same aside.

As a part of its defense, the city pleaded an offset, in which it alleged that it had been at a great expense in repairing the dam across Spring river, from which the light company had obtained its power to operate this plant, and claimed that the company should pay one-half of such expense. This calls for a construction of section 3 of the ordinance above quoted. The claim is made on the part of the city that by that section the company was bound to contribute to the maintenance of the dam in any event, while the company claims it was to contribute to such maintenance only in the event that it should find it necessary to put in an extra wheel with which to furnish additional power—in short, that the city agreed to furnish all the power necessary, without any charge to the company, except in case it should be found necessary to add to the power already in, and in that case the company should contribute its share to the maintenance of such additional power. The language of the section is: "In case it becomes necessary at any time to repair the dam or any part thereof or any appurtenances thereto in order to maintain said power at said dam in running order said grantee (the company) agrees to pay for said repairs." The power construction is not as clear as it might be, but, applying the accepted canons of construction, which are that, where reference is made to something precedent, the last item next before such reference must be held to be intended, we conclude that "said power," in the above quotation, means the power

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obtained by the placing of the extra wheel in the fore-bay, and that the company was not liable for repairs to the dam, except it found it necessary to place such additional wheel. This was the construction given by the referee and confirmed by the court.

Upon the whole case, we find that the ordinance, by the actual fulfilment of its terms, constituted the contract between the light company and the city; that there was no error in the findings of the referee that the understanding and agreement was that one-half night lights should be provided, instead of all-night lights, and that the company was not bound to contribute in part to the expense necessary to the repair of the dam.

Some objection is made by the plaintiff in error that interest was allowed by the referee upon some of the bills of the light company, which should not have been done. This is probably the case, for we find that the District Court corrected the finding of the referee in this matter.

Having reviewed the entire case, we find no error in the judgment of the District Court. It will, therefore, be affirmed. All the justices concurring.

NEW ENGLAND TELEPH. & TELEG. CO. v. BOSTON TERMINAL CO.

Massachusetts; Supreme Judicial Court.

1. CONTROL OF STREETS.—While public streets are under the control of local authorities by virtue of a delegation of authority by the Legislature, such authority may be resumed at any time by the Legislature.
2. STATUTES RELATIVE TO THE CONSTRUCTION AND USE OF CONDUITS.—Statutes relative to the construction and regulation of conduits in public streets do not convey private rights of property therein. Owners of such conduits have no title in the streets; such conduits are personal property, removable at pleasure, and the owners thereof are not entitled to damages where the streets occupied by them are taken for another purpose.

Petition for assessment of land damages under St. 1896, ch. 516, sec. 23. Reported 182 Mass. 397, 65 N. E. 835; decided January 6, 1903.

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Saml. L. Powers, Francis A. Houston and Matt. B. Jones, for petitioners.

Saml. Hoar and Woodward Hudson, for respondent.

Opinion by KNOWLTON, C. J.:

These are petitions for an assessment of land damages under St. 1896, ch. 516, sec. 23. Each of the petitioners is a corporation established under the laws of Massachusetts; the first for the transmission of intelligence by electricity, and the second for the purpose of manufacturing, transmitting, and supplying electricity for lighting. Each had conduits and wires in certain streets of the city of Boston when these streets were discontinued and taken for a terminal station under St. 1896, ch. 516. They were duly notified, and had ample opportunity to remove their property in the streets, so far as it was capable of being removed. The wires were removed, but the conduits and manholes were so constructed that they could not be taken up without such destruction as would render them worthless. The petitioners contend that they had rights of property in the streets, for which they are entitled to compensation. Their rights were acquired under certain statutes and under ordinances of the city of Boston, which it is not necessary now to consider particularly. The decisions in these cases depend chiefly upon general principles which lie at the foundation of legislation touching public streets and highways.

In this commonwealth, on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission and movement beneath the surface of the ground, as

well as upon or above it. Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone and electric lighting companies, and for water pipes, gas pipes, sewers and such other similar arrangements for communication or transportation as further invention may make desirable. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Suburban Light & Power Co. v. Aldermen of Boston*, 3 Am. Electl. Cas. 80, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497; *Attorney-General v. Railroad Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Howe v. Railway Co.*, 167 Mass. 46, 44 N. E. 386; *Natick Gaslight Co. v. Inhabitants of Natick*, 175 Mass. 246, 56 N. E. 292. All these agencies have a share in the use of the streets under the rights of the public. A person who walks or drives through a public street does it as one of the public, and not in the exercise of a private right of way. The permanent construction above referred to are permitted because they are used by the public, or a part of the public, or are held and used in private ownership for the benefit of the public. The rights in the streets which are so exercised or enjoyed are not private rights of property, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street, or whose property is carried through it. These public rights are primarily subject to the regulation and control of the Legislature, which represents the public. This regulation and control is usually delegated to the local authorities by general laws, and sometimes by special laws. But the Legislature remains all the time the supreme authority in regard to all public rights and interests. The authority which it delegates, it may at any time resume, and then it may exercise it as it deems best. *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *Spaulding v. Nourse*, 143 Mass. 490, 10 N. E. 179; *Tinker v. Inhabitants of Russell*, 14 Pick. 279; *Union Ry. Co. v. Mayor, etc., of City of Cambridge*, 11 Allen, 287; *Railroad Co. v. Wakefield*, 103 Mass. 261; *Attorney-General v. Boston*, 142 Mass. 200-203, 7 N. E. 722; *Brimmer*

v. City of Boston, 102 Mass. 19-22; *Stone v. City of Charlestown*, 114 Mass. 214-224; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Attorney-General v. Power Co.*, 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398; *Natick Gaslight Co. v. Inhabitants of Natick*, 175 Mass. 246, 56 N. E. 292.

All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets, and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights. Pub. St. ch. 109, secs. 1-3; Id. ch. 27, sec. 47; Id. ch. 28, sec. 4; St. 1883, ch. 221; St. 1889, ch. 398; St. 1894, ch. 454; Rev. Ord. Boston 1885, ch. 28, secs. 25-32; Rev. Ord. Boston 1890, ch. 18, secs. 3, 6, 10 and ch. 3, sec. 21; Rev. Ord. Boston 1892, ch. 36, secs. 8, 14, 16 and ch. 3, sec. 21. But where there is no such express provision the result is the same. Their rights in connection with the rights of others of the public are subject to reasonable regulation, or even to termination at any time, if the supreme authority, acting in the public interest, shall so determine. It follows that they have no rights of property in the street, and their constructions that were built therein were personal property, which they had a right to remove, and which could not be subjects for the assessment of damages under statutes of this kind. *Com. v. Lowell Gaslight Co.*, 12 Allen, 75; *Dudley v. Aqueduct Corp.*, 100 Mass. 183; *Natick Gaslight Co. v. Inhabitants of Natick*, 175 Mass. 246, 56 N. E. 292; *Edmands v. City of Boston*, 108 Mass. 535; *Allen v. City of Boston*, 137 Mass. 319; *Williams v. Com.*, 168 Mass. 364, 47 N. E. 115. See St. 1902, ch. 342.

Looking at the cases from a little different point of view, these public rights, being subject to the control of the Legislature, were terminated by St. 1896, ch. 516, which provided for the discontinuance of the streets, and a taking by the respondent. When

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these places ceased to be public streets, all rights of the public in them came to an end, and they became subject to the different kind of public use to which they were appropriated by the statute. It is a familiar rule that the discontinuance of a public way terminates the right of travel of the public in it, and leaves it for other uses. The action taken by the respondent first worked a discontinuance of the streets, and then appropriated them to the public use for a terminal station. The damages to be assessed were only for rights of property in the real estate at the time of the taking. As the petitioners had no such rights, there must be in the first case, under the terms of the report, a judgment for the respondent, and in the second case a like judgment must be affirmed.

So ordered.

DULUTH, CITY OF, v. DULUTH TELEPH. CO.

Minnesota; Supreme Court.

1. **FRANCHISE OF TELEPHONE COMPANY NOT REVOKABLE; REMOVAL OF WIRES AND POLES; MUNICIPAL CONTRACT.**—The Duluth Telephone Company was organized under title 1, ch. 34, Gen. St. 1878, before section 28, ch. 34, Gen. St. 1866, was amended by chapter 73, Gen. Laws 1881. By a special act approved March 7, 1881, the exclusive right was conferred upon the company to erect its poles and wires upon the streets of the city for the period of 10 years, which right was extended for the further period of 10 years by a special act approved April 13, 1889. Commencing in 1882 under the authority of both the general and special acts, the company constructed its telephone system within the city, and has since maintained and continued to extend the same therein. The time granted under the special acts having expired, on November 29, 1898, under the provisions of chapter 74, Gen. Laws 1893, the common council offered to sell a franchise to construct a telephone system within the city upon certain conditions; and, defendant having refused to submit a bid, the franchise was granted to another company, which thereupon constructed a telephone system, which it has since maintained and operated. On February 13, 1900, the city council passed a resolution requiring defendant on or before April 1, 1900, to remove its poles and wires from the streets, avenues, and alleys of the city. Upon defendant's refusal to comply with

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the order, the city commenced an action to enjoin defendant from further extending its system, and to compel the removal of the poles and wires already erected. *held:*

1. That section 28, Gen. St. 1866, as amended by chapter 73, Gen. St. 1881 (section 2641, Gen. St. 1894), authorized defendant to enter upon the streets and alleys of the city and erect its poles and wires therein, subject only to the police power of the city to control and regulate the same.
2. The company having established its plant in reliance upon the provisions of the general law (section 2641, Gen. St. 1894), such action on its part constituted an acceptance of the right or privilege thus granted, and its occupancy of the streets thus acquired, including the right to extend its system within the city as occasion might require, became fixed, in the nature of vested rights, which cannot be revoked by the city, except within the exercise of its police power. *Northwestern Tel. Exch. Co. v. City of Minneapolis*, 83 N. W. 527, 86 N. W. 69, 81 Minn. 140, 53 L. R. A. 175.

Appeal by plaintiff from judgment for defendant. Reported 84 Minn. 486, 87 N. W. 1128; decided March 29, 1901.

Oscar Mitchell, for appellant.

Billson, Congdon & Dickinson, for respondent.

Opinion by LEWIS, J.:

The plaintiff municipality was organized under a special act of the Legislature approved March 2, 1887. The defendant company was organized under title 1, ch. 34, Gen. St. 1878, and its corporate existence began February 15, 1881. By a special act approved March 7, 1881, the exclusive right was conferred upon the municipality, as it then existed, to erect and maintain telephone poles and wires upon and over its streets, avenues and alleys for a period of ten years; and by the special act of the Legislature approved April 13, 1889, this privilege was extended until the 8th of March, 1899. Commencing in 1882, and continuing down to the present year, the defendant company has, in the customary manner, established its plant, erected its poles, and strung wires thereon, to the extent of some fifty miles, in the streets, avenues and alleys of the city of Duluth. The charter of 1887, through the common council, conferred upon the city the power

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“to prevent the encumbering of streets, sidewalks, alleys, lanes, public grounds or wharves with . . . posts . . . or any other materials or substances whatsoever,” and “to remove and abate a nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city.” By chapter 74 of the general laws of 1893, title 1, ch. 34, Gen. St. 1866, was amended in part as follows: “But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alley or other highway of any city or village, . . . any improvement of whatsoever kind or nature without first obtaining a franchise therefor from such village or city, according to the terms of its charter, and without first making just compensation therefor as herein provided.” There was also a further amendment to the effect that such corporation should be subject to any conditions imposed from time to time by the village or city, which might, at the end of every five years from and after the granting of a franchise for the construction of any improvement whatsoever, have a right, under certain conditions, to purchase the same. After the expiration of the 20 years’ grant under the special acts of 1881 and 1889, the company continued to occupy the streets and to extend its system. After the amendment of 1893 went into effect the defendant company continued erecting its poles and stringing wires thereon in the streets, avenues and alleys to the extent of several thousand feet. On November 29, 1898, the common council of Duluth passed an ordinance providing for the sale by the city of a franchise for the establishment and operation of a telephone exchange system, which contained elaborate provisions with reference to bids and their acceptance. The defendant company did not submit a bid in accordance with the ordinance, and thereafter, on March 11, 1899, the city granted a franchise to another company, which was accepted by it, and a telephone plant constructed in conformity to the requirements of the ordinance. Subsequently, on February 13, 1900, the council adopted a resolution requiring defendant on or before the 1st of April, 1900, to remove its poles and wires from the streets, avenues, alleys and public grounds of the city of

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Duluth, and to cease using the same for the purpose of carrying on its telephone business. A copy of this resolution was served upon the defendant company, which refused to comply therewith, whereupon this action was commenced by the city to enjoin the defendant company from further extending its system, and to compel the removal of that part already erected. The defendant justified its action in an answer which set forth the laws under which it claimed to be authorized, and alleged that its possession of the streets, avenues, alleys and public grounds of the city was in the ordinary and usual manner, and without interference with the safety or convenience of ordinary public travel. The court found as facts that the defendant company constructed its plant and occupied the streets and alleys of the city in reliance upon the special acts above mentioned, and also upon the general law embodied in section 28, ch. 34, Gen. St. 1886, as amended by chapter 73 of the general laws of 1881 (sec. 2641, Gen. St. 1894); that the resolution requiring defendant to remove its plant from the city was adopted by the common council under the mistake of law that it was erected without right or legal authority; and that such resolution was passed without any intention of expressing the council's judgment as to its power to regulate under its police power. Judgment was entered for the defendant, and the city appealed.

The findings of fact by the trial court are not attacked by appellant, and the propositions which it submits for consideration in this court are embodied under the following heads: (1) That the amendment of 1881 (sec. 2641, Gen. St. 1894) did not become a part of the charter of the Duluth Telephone Company. (2) That, if such amendment did become a part of defendant's charter, (a) it granted simply a privilege or license, revocable at any time by the State, or, when duly authorized, by the city; (b) that if such amendment became a part of defendant's charter, in the nature of a contract right, then the rights of defendant became vested only to the extent of the expansion of its system at the time of the adoption of the city charter, in 1887, and the amendment of title 1, ch. 34, in 1893.

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All of these propositions were involved and necessarily decided in the case of *Northwestern Tel. Exch. Co. v. City of Minneapolis*, 7 Am. Electl. Cas. 168, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, and there only remains for us an application of the principles announced in that case to the facts in this controversy. On reargument in that case it was decided that the words "public roads and highways," as used in section 2641, Gen. St. 1894, applied to streets and alleys of cities and villages, and that, under the provisions of that section, appellant had authority to enter upon the streets and alleys of Minneapolis, for the purpose of erecting its poles and stringing its wires, without first obtaining the consent of the governing body, and subject only to the police power of the city. It was there also decided that the amendment of 1881 (sec. 2641) was in the nature of an amendment of the company's charter to the same extent as though enacted prior to its organization, and it was impliedly held that the rights and privileges of the company under the general law which authorized its organization were to all intents and purposes of the same force as though organized under a special act, and the particular provisions referred to had been embodied in such special charter. It was also held that the company having entered upon the streets of the city by virtue of its organizing act, as amended, and erected its poles and wires in accordance with the direction of the city council, such council was thereafter powerless to arbitrarily and without cause remove the poles and wires from the streets, unless acting within its province to regulate and control under its police power. In the present case counsel makes a distinction between a so-called charter contract and a license or privilege, contending that, by the statute as amended in 1881, defendant, at most, obtained merely a privilege or license, which it was within the State's power to recall at any time. It will not be necessary to enter into a discussion of the technical meaning of a charter contract, or contractual right as expressed in a charter, and a license or privilege. The decisive question is what contract was made, if any—what was the intention of the State in enacting the law, and of the defendant company in accepting and

relying upon it? Section 2641, as it now appears in the general statutes of 1894, was an amendment to section 42, ch. 34, Gen. St. 1878. It was under this chapter that the defendant company was organized, and that chapter, as amended, contained the law which regulated the defendant in its relation to the State and city of Duluth. Whether the amended act expressed a contract right, or but the granting of a privilege, inoperative until accepted, we need not now stop to inquire.

The city contends that the future operations of defendant were not conducted in reliance upon the general law as amended. On the contrary, it claims that the plant was erected under the express authority of the special act of March 7, 1881, which conferred upon the company the exclusive right to erect its system in the streets of the city. For the purposes of this case, we must assume that defendant erected its plant in dependence upon the general as well as the special law. Upon this point appellant is foreclosed by the finding of the trial court, which is not assailed. The court found that defendant relied upon both the general and special law in building and extending its system within the city. It is contended, however, that, conceding the company was operating under the general law, such authority was repealed by the provisions of the city charter of 1887. Without admitting the State's ability to delegate authority to the city to prevent defendant from continuing the use of its streets for the purposes of its telephone system, it is clear that no such power was attempted by the 1887 charter. The powers there granted are restricted to the prevention of the incumbering of streets, sidewalks, etc., and to the removal and abatement of nuisances upon streets and highways. Such grant of power must be construed consistently with the rights already acquired by defendant under section 2641, and extends only to the reasonable exercise, control and regulation of its police power. *Northwestern Tel. Exch. Co. v. City of Minneapolis, supra*. Again, appellant contends that the authority embraced within section 2641 was repealed by chapter 74, Gen. Laws 1893. This amendment of 1893 provided that no corporation organized under section 1, tit. 1, ch. 34, Gen. St.

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1866, should have any right to construct, maintain, or operate upon or within any street, alley, or other highway of any city or village any improvement, of whatsoever nature or kind, without first making just compensation, and obtaining a franchise therefor from such city or village. In our opinion, this amendment repealed the provisions of section 2641, so far as it applied to the State at large, or to new enterprises undertaken by defendant in other cities or villages. It does not follow that, because section 2641 was repealed by the amendment of 1893, it operated as a repeal of defendant's authority to maintain and extend its system within the city of Duluth. We are asked to decide that the 1893 amendment wiped out defendant's authority not only to extend its system in other streets as the growth of the city might warrant, but also to maintain the plant and system as already built and operated. In the Minneapolis case we held that, where the company had made substantial improvements upon the strength of authority granted to it by the State, the rights acquired in so doing become vested, and cannot be interfered with by subsequent legislation. The same principle applies to the extension of the telephone system in the city of Duluth. If the State might at any time step in and prevent the extension of the system, the profit of such an enterprise would indeed be dubious, and offer slight attraction to capital. If the company were prevented from making extensions, its privileges not being exclusive in the streets already occupied, it might in a few years be superseded by competitors who had the entire city at their command. The natural and reasonable construction to be placed upon the relation of the parties hereto is that the company having in good faith expended large sums of money in the construction of its plant, it constituted an acceptance of the charter rights or privileges, which included the implied right to maintain and extend its system and make it remunerative. The resolution of the city council requiring the removal of the poles and wires of defendant's system from the streets, alleys and public grounds of the city of Duluth having been passed, not in the exercise of its police power, but upon the

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theory that the company had no legal right to maintain the same, it follows that it was void and powerless to affect defendant's interests.

Judgment affirmed.

CARTHAGE, CITY OF, v. CARTHAGE LIGHT CO.

Missouri; Court of Appeals of Kansas City.

1. **STATUTE AUTHORIZING FRANCHISE TO ELECTRIC LIGHT COMPANY.**—A statute (Act Feb. 27, 1875) authorizing a city council to enact ordinances granting privileges to use the streets of a city to provide the city with water and light and to erect gas works and lay down pipes for the use of the city and its inhabitants is not sufficient to authorize a grant of a franchise to an electric light company for the occupation of the streets by its wires and poles. The court took judicial notice of the fact that when said statute was passed the Legislature did not contemplate the possibility of the use of electricity for the lighting of public streets.
2. **FRANCHISE FOR ELECTRIC STREET RAILWAY COUPLED WITH LIGHTING PRIVILEGE.**—A franchise for the use of streets for an electric railway and also granting a privilege to erect poles and wires for electric lighting purposes cannot be disconnected so as to permit an assignment of the privilege of erecting electric light wires and poles to one not owning or operating the electric railway.

Appeal by plaintiff from judgment for defendant. Reported 97 Mo. App. 20, 70 S. W. 936; decided December 1, 1902.

I. F. Shannon and H. J. Green, for appellant.

John A. Eaton and Howard Gray, for respondent.

Opinion by SMITH, P. J.:

The plaintiff is a city of the third class, and the defendant is a business corporation organized in 1897 under the provisions of article 8, ch. 42, Rev. St. 1889. The plaintiff was organized

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under the act of March 15, 1873 (Sess. Acts 1873, p. 221) and the Amendatory Act of February 27, 1875, and continued to thus exist until 1890, when it became, and ever since has remained, a city of the third class under the statute (Sess. Acts 1893, p. 65). In 1885 the plaintiff, by ordinance, granted the Sperry Electric Light & Power Company and its assigns permission to erect, maintain and operate electric light works, and to transmit power by means of poles and wires for a period of twenty years. In 1894 the plaintiff, by a further ordinance, granted to F. H. Fitch and assigns the privilege to construct, maintain and operate over certain of its streets and alleys an electric railway, and also the further permission to erect poles and wires for electric lighting purposes. It stands admitted by the pleadings that while the plaintiff existed under its special charter—the said act of 1875—the privilege was granted by it to the assigns of the defendant to use its streets and alleys for the erection of poles and the swinging of wires thereon, and that the defendant had succeeded to the ownership of the said privileges so granted to its assigns, and as such assignee was occupying said streets and alleys thereunder. There is no issue made by the pleadings as to the assignment and ownership of the privileges granted especially to Sperry and Fitch; and, if there had been, the uncontradicted and unobjected to evidence adduced by the defendant clearly established the affirmative of that issue. It is conceded that the plaintiff had at no time granted to the defendant directly the right to erect its poles or swing its wires in the streets and alleys of the former, so that, if the defendant has any right to use and occupy the streets and alleys of the plaintiff with its poles and wires, that right is derived exclusively through the grants made to one or both of its assignors. The question, then, is, did that right pass to the defendant's assignors, or either of them, under the ordinances to which we have alluded? The Sperry privilege was granted in 1885, while the plaintiff was governed by the charter act of 1875, so that whether that act authorized the passage of the ordinance granting that privilege is one of the decisive questions we are required to determine. Sections 19 and 27 of article 5 of that act

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provide that the city council shall have the power by ordinance "to provide the city with water and light," and to provide for lighting the streets and erecting lamps thereon; and section 49 of the same article provides that the said council shall also have power to erect, maintain and operate waterworks or gasworks, and to regulate the same; to acquire grounds on which to erect such works, etc.:

"Provided (1) the mayor and council may in their discretion grant the right to any person or persons to erect water works or gas works and lay down pipes, mains, etc., for the use of the city and its inhabitants as the council may by ordinance prescribe: provided (2) that such right shall not be granted for a longer time than thirty years and shall not be granted unless the consent of a majority of the qualified voters of the city voting at an election for that purpose shall so determine."

These three sections of the act are in *pari materia*, and must be treated as if one section, and that construction adopted that will give effect to all of them. *City of St. Louis v. Howard*, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630; *Andrew Co. v. Schell*, 135 Mo. 31, 36 S. W. 206. The first of these confers upon the plaintiff the power to provide light and to erect lamps for that purpose on the streets, and the other authorizes this utility to be provided in one of two ways; that is to say, either by erecting, maintaining and operating gas works itself, or by granting the right to some other person to do so. The latter section was intended to qualify the exercise of the power conferred by the first two; or, in other words, while the power to light was conferred, the only kind of a plant that was authorized to be constructed for the production of such light was a gas plant. There was no authority given for the construction of an electric plant, or to transmit electric power by means of poles and wires placed in the streets and alleys of the city. We may take notice of the fact that in 1875, when the said act was passed, among the possibilities of electricity that of using it as an illuminator to the extent of lighting a city by means of it was not one of those contemplated by the Legislature. There are no terms employed in the act which authorized the passage of an ordinance to erect an electric plant, or

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to occupy the streets and alleys with the poles and wires used by it for the transmission of power, etc. The grant of legislative powers to municipalities is to be strictly construed, and, if there be a reasonable doubt of the existence of a power, it will be held not to have been granted. *Knapp v. Kansas City*, 48 Mo. App. 485; *Kansas City v. Lorber*, 64 Mo. App. 608; *Waterworks Co. v. Kansas City*, 20 Mo. App. 237; *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 626, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. It can be safely asserted as a fact that the lighting of the plaintiff city by electricity was not one of the things the Legislature had in mind, or intended to authorize or accomplish, by the passage of the act. But, if this construction is considered too narrow, and if the contention be upheld that the power to erect an electric plant or to confer that power upon one or more persons is implied in the terms of the act, still the exercise of that power is denied by the terms of the second proviso of the act already quoted unless the consent of the majority of the qualified voters was first obtained, and of this there is no pretense. The proviso just referred to operates as a limitation only on the exercise of the power conferred by the terms of the first proviso. So that, no difference what construction of the act in its entirety may be adopted, it is clear that the ordinance in question was unauthorized by the act, and gave to the grantee therein named or its successor no authority to occupy the plaintiff's streets and alleys with its poles and wires for any purpose.

Turning to the other question—that is to say, whether or not the passage of the said ordinance relating to the grant to Fitch and assigns was an authorized exercise of its charter power—it is to be observed that this ordinance was passed in 1894, after the plaintiff had become a city of the third class under the statute. So that the question is to be determined by reference to the act of April 19, 1893. (Sess. Acts 1893, p. 85). By section 95 of that act, the council were authorized to provide for the lighting of streets and the erection of lamp-posts, poles and lights therefor, and to make contracts with any person for lighting the streets with gas, electricity, or otherwise, provided (1) that no contract should

be for a longer period than ten years, and provided (2) that no such contract should obtain any validity until ratified by a two-thirds majority of the qualified voters, etc. The section further provides that the council should have the right to erect and operate gas works, electric light works, or works of any other kind or name, and to erect lamp-posts, electric wire poles, or any other apparatus or appliances necessary to light the streets, alleys, etc.; and in the third proviso of the section the council are authorized to grant the right to any person to erect such works, lay the pipe, wires, and erect the posts, poles, etc., therefor; and in the fourth proviso of the section it is further provided that such right to any such person shall not extend for a longer period than thirty years, nor be granted or renewed without the consent of a majority of the qualified voters, etc. The second and fourth proviso above referred to render a concession by the council like that to Fitch nugatory unless consented to by the qualified voters of the city. No such consent to the Fitch concession was ever obtained. While the ordinance, in so far as it is intended to furnish authority to Fitch and his assigns to erect upon the streets and alleys poles and wires for the transmission of electricity for heating, lighting and power purposes, is invalid, and inefficacious, except that it is sufficient to authorize Fitch and his assigns, as a part of the equipment of said street railway provided for in other sections of the ordinance, to erect and maintain poles and wires in the streets and alleys of the city incidental to and in connection with the operation of the said street railway, yet such right cannot be disconnected with the operation of said street railway and transferred to one who does not own the said street railway franchise nor operate the same under it. This ordinance, not having been consented to by the qualified voters of the city, as required by the statute, which was the charter of plaintiff, was without legal validity in so far as it authorized the grantee therein to erect posts and wires in the streets of the city to light the same; and to that extent the right conferred by it was not the subject of transfer, and therefore defendant can base no right on that ordinance. Some reference is made in briefs of counsel to *Waterworks Co. v.*

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Webb City, 78 Mo. App. 422, but that case is not in point here. The city was not there, as here, restricted, in the exercise of the power that was in question, to a particular mode. Where such a restriction in a charter power exists, that power cannot be exercised in a manner that is inconsistent with such restrictions. It seems quite clear to us that the power conferred on the plaintiff city by said several legislative enactments was exercised in a manner inconsistent with the restrictions therein imposed, and therefore they are invalid, and did not confer upon the grantees therein named, nor the defendant, their assignee, the rights claimed by the latter.

Defendant finally argues that, even if the poles and wires of defendant were a continuing public nuisance, the plaintiff, by reason of its long acquiescence therein, is estopped to claim injunctive relief. One of the difficulties about this contention is that no estoppel or acquiescence was pleaded or relied on in the trial, and hence there is no issue of that kind before us for consideration. In no case wherein pleadings are required can an estoppel *in pais* be made available, unless it is pleaded. *Railway Co. v. Curtis*, 154 Mo., loc. cit. 20, 55 S. W. 222; *Avery v. Railroad Co.*, 113 Mo., loc. cit. 568, 21 S. W. 90; *Hammerslough v. Cheatham*, 84 Mo., loc. cit. 21; *Noble v. Blount*, 77 Mo., loc. cit. 242; *Ferneau v. Whitford*, 39 Mo. App., loc. cit. 316; *Webb v. Allington*, 27 Mo. App., loc. cit. 571.

Accordingly we shall reverse the decree and remand the cause. All concur.

Phillipsburg Elect. L., H. & P. Co. v. Inhabitants of Phillipsburg.

**PHILLIPSBURG ELECT. L., H. & P. CO. v. INHABITANTS OF
PHILLIPSBURG.**

New Jersey; Supreme Court.

1. **REPEAL OF ORDINANCE GRANTING FRANCHISE TO ELECTRIC LIGHT COMPANY.**—A common council cannot repeal an ordinance granting permission to an electric light company to place its poles and stretch its wires on all the streets and alleys of the town when the company has conformed to the conditions of the ordinance so far as required, and has expended money in placing the poles and wires on certain of the streets, notwithstanding the common council may have been misled in passing the ordinance.
2. **OFFICERS AND STOCKHOLDERS DIFFERENT FROM THOSE OF ORIGINAL COMPANY.**—That the officers, managers, and stockholders of the company are different individuals from those who were stockholders when the permission was granted, gives no ground for the repeal of the ordinance.
3. **FORFEITURE OF FRANCHISE FOR VIOLATION OF ORDINANCE.**—If the corporation is violating its charter or the laws of the State, it is liable to a proceeding to forfeit its charter, but the ordinance of the common council, granting permission to erect poles and wires, cannot for that reason be repealed.

(Syllabus by the court.)

Certiorari to review ordinance. Reported 66 N. J. Law, 505, 49 Atl. 445; decided June 10, 1901.

S. C. Smith, for prosecutor.

L. W. Schultz, for respondent.

Opinion by GARRETSON, J.:

By an ordinance approved August 24, 1896, the common council of the town of Phillipsburg passed an ordinance permitting the prosecutor to place its poles and stretch its wires on each and every street and alley in the town, for the purpose of conducting electricity through the town. The ordinance prescribed the character of the poles and the manner of stringing the wires, and the supervision under which they should be erected. It also required certain services to be performed by the company for the town, in consideration of the permission granted and provided for the filing

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of an acceptance of the ordinance. The acceptance of the ordinance was duly filed as required. In the spring of 1899, the company built more than a mile of a pole and wire line in Phillipsburg, and there is evidence to show that this was done under the supervision of the committee on streets and alleys, as provided in the ordinance, and made contracts for over 800 lights for private consumers, and the first lights were used in April, 1899, and have continued to be used ever since. There is nothing to show that the prosecutor has in any way refused to perform for the town the services required by the ordinance. On the 15th of October, 1900, the common council passed another ordinance repealing the foregoing ordinance, and this writ is brought to test the legality of that municipal action.

We think that this question is settled by the cases of *Hudson Telephone Co. v. City of Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, 8 Atl. 123, and *Suburban Electric Light & Power Co. v. Inhabitants of East Orange Tp.* (N. J. Ch.), 7 Am. Electl. Cas. 37, 41 Atl. 865, which hold that permission granted by a common council, under like circumstances to this, was, after acceptance and expenditure of money under it, irrevocable.

The proceedings leading to the passage of the original ordinance cannot be reviewed by this writ, nor can we now look into the considerations which influenced the members of the common council to vote for it. It is an attack upon it in a collateral proceeding. Fraud or misrepresentation is not sufficient to avoid the act of a legislative body, even if proved. *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co.*, 20 N. J. Eq. 61-76.

That the stockholders, officers and managers of the company are now persons different from those who were its stockholders, officers and managers when the permission was granted could not afford a reason for the repeal of the ordinance granting permission. The permission was to the corporation, not to the individual members thereof. If the corporation is not complying with the terms of the permitting ordinance, obedience thereto should be enforced by appropriate proceedings. But, if the ordinance was repealed, it could be remade. The repeal of the ordinance would

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not accomplish such obedience, but would be the imposition of a penalty for failure to comply therewith, and no such penalty is anywhere authorized. If the corporation is engaged in acts not warranted by its charter, or in violation of the laws of the State, that is a matter in which the State is concerned, and a proceeding to forfeit its franchise would be the appropriate remedy. *Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844; *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971. This repealing ordinance must be set aside.

CITY OF BRADFORD v. N. Y. & PENNSYLVANIA TELEPHONE & TELEGRAPH CO.

Pennsylvania; Supreme Court.

1. REMOVAL OF POLES AND WIRES FROM STREETS AND HIGHWAYS; LACHES.—

Where a city permits a telephone company to erect and maintain poles and wires on its streets without protest or objection for a period of more than twenty-one years, during which time the company had expended large amounts in the maintenance of such poles, and the city had received valuable consideration in the use of such poles for the carrying of the wires of its fire alarm service; had received and duly receipted for license and pole taxes assessed against the company, and had used telephone instruments furnished by the company down to the date of the hearing; it was held that the municipality was guilty of *laches*, and that its bill requesting that the defendants be restrained from erecting new poles or stringing new wires upon the streets of the municipality, and that they be required to remove the poles, wires and cables in place or erected by them, was properly dismissed.

Appeal by plaintiff from a decree dismissing its bill. Reported 56 Atl. 41; decided July 9, 1903.

The bill alleged the incorporation of the plaintiff as a city of the third class, and the incorporation of the defendant the Pennsylvania & New York Telephone & Telegraph Company under the General Corporation Act of April 29, 1874, its supplements and amendments, with particular reference to the act of May 1, 1876 (P. L. 90), as amended by the act of June 25, 1885 (P. L. 164). It alleged the incorporation of the defendant the New

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York & Pennsylvania Telegraph & Telephone Company under the laws of the State of New York. It further alleged that, by the acts of assembly under which the defendant the Pennsylvania & New York Telegraph & Telephone Company is incorporated, defendant is authorized to use and occupy the streets of the city for the purpose of constructing and maintaining telephone lines only after consent obtained from the city by ordinance; that the defendant the New York & Pennsylvania Telephone & Telegraph Company is without authority under any circumstances to erect or maintain poles or wires on the streets of the plaintiff city. It further averred that the defendant companies have erected and are maintaining a large number of poles in the city, and have strung and placed thereon a large number of wires and cables, without warrant of law or permission from the city of Bradford, and are using the same for the purpose of carrying on a telephone business and operating a telephone exchange in said city, and are continually placing new obstructions in the plaintiff city by erecting new poles and stringing new wires; that the poles so erected are owned by the Pennsylvania corporation, the Pennsylvania & New York Telephone & Telegraph Company, and leased by them to the New York corporation, the New York & Pennsylvania Telegraph & Telephone Company; and that the plaintiff city required the defendants to remove their poles and wires from the streets of said city, but the defendants have refused so to do. The bill asked that the defendants be restrained from erecting any new poles or stringing any new wires upon the streets of the plaintiff city, and that they be required to remove the poles, wires and cables in place or erected by them.

The answer admitted the incorporation of the plaintiff city, and the incorporation of the defendants as alleged in the bill, but denied that the Pennsylvania corporation comes within the provisions of the act of May 1, 1876. The defendants admitted having a large number of poles and wires on the streets of said city, as alleged in the bill, but denied that they were erected without consent of the city, and averred that the defendants are the owners of certain franchises and rights to erect and maintain poles and wires upon the streets of the plaintiff city, pursuant to the contract between the city and the Bradford Telephone Exchange, made in 1879, to whose right the defendants have succeeded. The answer averred that in pursuance of said contract the Bradford Telephone Exchange erected a large number of poles, and strung wires upon the streets, which are now a part of the system of the defendant companies, and that the plaintiff city is now, and has been since the inception of said system, using the poles thereof for the carrying of the wires of its fire alarm system. It averred that all poles erected and all wires strung by defendant companies were erected and strung by the proper permission of the proper authorities of the plaintiff city. It averred that the plaintiff city had recognized the defendant companies by imposing upon them and collecting from them certain licenses from time to time. It further averred that the defendants and their predecessors in title have exercised the rights and privileges which they are now claiming for a period of twenty-one years previous to the filing of the bill in this case. It further averred that

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the defendant companies are engaged in interstate commerce, and are, therefore, entitled to the privileges and immunities granted by the Constitution and laws of the United States, and further denied that the plaintiff city is entitled to the relief prayed for.

W. E. Burdick and F. P. Schoonmaker, for appellant.

George A. Berry, John G. Johnson, D. H. Jack and Robert L. Edgett, for appellees.

Opinion by BROWN, J.:

Under nine different heads the court below passed upon twelve distinct questions regarded by it as involved in the decision of this case, and counsel for appellant and appellees discuss them in most elaborate printed arguments; but, as it is clear to us that the long acquiescence of the city of Bradford in what was done by the appellees and their predecessors, and its *laches* in filing this bill, are conclusive against its right to do so, no other question need or will be considered here.

In the court's eighth conclusion of law there is a summary of material facts, which were fairly found from the testimony. They are that the borough of Bradford and the city of Bradford, its corporate successor, had permitted the defendants and their predecessors in ownership for more than twenty-one years to occupy the streets and highways of the said borough and city with poles and wires; that, without protest or objection, the borough and city stood silently by while the defendants were, during this period, making, in good faith, an expenditure of from \$75,000 to \$100,000; that by numerous resolutions passed by both branches of council, and many of them duly approved by the mayor, consent had been given to the erection and use of the poles, cross-arms, etc., on the streets and highways of the city; that for the privileges extended by it to the defendants it had received a valuable consideration in the use of the poles for the carrying of the wires of its fire alarm service; that it had received and duly receipted for license and pole taxes assessed against the defendants; that it had used the telephone instruments furnished by the de-

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fendants down to the date of the hearing in the court below; that it had, by general ordinances, regularly passed, approved and published, regulated the manner in which the poles should be erected and placed; that a consideration to the city in extending privileges to the defendants was a reservation of "the topmost gain" for police and fire alarm wires, and that the city had permitted all the poles of the defendants to be erected under the direction of either the street committee of council, the street commissioner, or the city engineer. In view of this acquiescence in what, at this late day, is complained of, a chancellor would unhesitatingly dismiss the bill, if the complainant were an individual. Ought any other rule to be applied to this city?

While the authorities with us are not numerous in holding that *laches* may be imputed to the commonwealth and municipalities in denying them equitable relief which might otherwise be granted, the rule that it can be imputed to the public is clearly laid down in several cases. "*Laches* may be imputed to the commonwealth as well as to an individual." *Commonwealth ex rel. Attorney-General v. Bala & Bryn Mawr Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105. In *Penna. R. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A 766, 46 Am. St. Rep. 677, we said: "But we know as matter of current history that street railways have been projected, and actually constructed, and are now in operation, over country roads where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of land-owners along their routes. Where such enterprises have been allowed to proceed, and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake under the influence of which these enterprises have been pushed to completion."

What was said in *Attorney-General v. Delaware & Bound Brook Railroad Co.*, 27 N. J. Eq. 1, in denying an injunction asked for by the State, may well be regarded as applicable to the facts in the present case: "The work has been, from its com-

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mencement, a matter of public notoriety, and yet no action has been taken on the part of the State authorities, nor even any warning uttered by them against the work. The defendants have been permitted to make their immense expenditure upon their enterprise, in the confidence of their convictions that they possessed all requisite legislative authority, without even a word of protest or remonstrance. Under such circumstances, equity will refuse its aid, even to the State."

A stronger case of delay or acquiescence is necessary to prevent equitable relief when sought for by the State than when a mere private right is involved; but the doctrine is applied against the public in a proceeding by the Attorney-General. High on Injunctions (3d ed.), sec. 837. In the present case the acquiescence and the *laches* of the appellant are clearly in the way of any equitable relief to it. We pass upon no other question.

Decree affirmed, and appeal dismissed, at appellant's costs.

STATE EX REL. WISCONSIN TELEPHONE CO. V. CITY OF
SHEBOYGAN.

Wisconsin; Supreme Court.

1. **EFFECT OF STATUTE ENACTED SUBSEQUENT TO GRANT OF FRANCHISE TO TELEPHONE COMPANY.**—Where a telephone company organized under a general statute giving it the right to occupy city streets had exercised such right prior to the enactment of a statute (Wis. Rev. Stats. 1898, secs. 940c-940j), providing that all franchises granted by a city or village shall be sold pursuant thereto if a majority of the electors shall so determine by vote, its rights under its charter and franchise cannot be affected by the adoption of such statute by the electors of a city, and the consequent regulations thereby prescribed controlling the location of its poles and wires and its charges. See *State ex rel. Wis. Teleph. Co. v. City of Sheboygan*, 7 Am. Electl. Cas. 109, 111 Wis. 23, 86 N. W. 657.

Appeal by relator from judgment for respondents. Reported 114 Wis. 505, 90 N. W. 441; decided May 13, 1902.

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Miller, Noyes & Miller, for appellant.

T. M. Bowler, for respondents.

Opinion by CASSODAY, C. J.:

It appears from the record that February 17, 1900, the relator filed in the trial court its petition for an alternative writ of mandamus to compel the city and its common council and officers to grant the petition of the relator, dated August 31, 1899, and submitted to the common council September 11, 1899, with the plan made by the relator—copies of both of which were thereunto attached—and to approve of such plan, and for such other, further and different relief as may be just and equitable. To such petition the defendants made return March 26, 1900. To such return the relator demurred for insufficiency April 12, 1900. From an order overruling such demurrer the relator appealed to this court. On June 20, 1901, that order was reversed by this court, and the cause was remanded, with directions to sustain the demurrer to the return, and for further proceedings according to law. 7 Am. Electl. Cas. 109, 111 Wis. 23, 41, 86 N. W. 657. The substance of such petition and return are stated in the report of the case, and no repetition here is necessary. Upon the remittitur being filed, the defendants, with leave of the trial court, filed an amended return August 20, 1901, containing the substance of what was contained in the original return, and in addition also alleging, in effect, that upon a petition signed by 10 per centum of the qualified electors of the city, and filed with the city clerk twenty days prior to the general election, held November 6, 1900, the question of granting franchises by the common council as prescribed by section 940j, St. 1898, was submitted to a vote of such electors, and 1,494 of such electors voted in the affirmative, and 301 in the negative, and that thereupon sections 940c to 940i of the statutes of 1898 became and continued to be in force, and applied to the city of Sheboygan, and that the defendants had "no power or authority to act contrary to such sections;" that August 15, 1901, preambles and a resolution were

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adopted by the common council, reciting the petition of the relator, dated August 31, 1899, and so submitted September 11, 1899, and also the adoption by the qualified electors of the city of the right to grant franchises as prescribed by sections 940c to 940i, St. 1898, and that the rules and regulations for the maintenance and operation of the extension of the relator's telephone plant, and the conduct of its business, be, and the same were thereby, established, to the effect that poles might be set and wires run upon the streets as therein prescribed; the manner of conducting its central exchange, and its attendants; the quality and condition of the wires; the maximum rate of charges to persons or customers; the manner of erecting and placing all poles, wires and appurtenances; and that bids for such franchise should be advertised as therein prescribed, and that, in case the relator should make the highest bid, such franchise should be granted to it upon making the requisite deposit and giving the requisite bond; that after the passage of such resolution, August 15, 1901, the common council did so advertise for bids for such franchise up to and including October 1, 1901; that the relator had not submitted any bid pursuant to such advertisement; that by such resolution the defendants had complied with the law with reference to such petition; and that in and by such resolution the defendants had exercised their discretion and judgment in the premises. The relator demurred to such amended return on the ground that it does not state facts sufficient to constitute a defense, or any reason why the peremptory writ of mandamus should not issue. From the order overruling such demurrer, the relator brings this appeal.

It is conceded in the amended return, as it was in the original return, that the relator was in 1882 duly incorporated and organized for the purpose of conducting a telephone business under chapter 86 of the statutes of this State. See sections 1771, 1775, 1778, St. 1898; *Wisconsin Tel. Co. v. City of Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, 21 N. W. 828; *Roberts v. Telephone Co.*, 3 Am. Electl. Cas. 471, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; *City of Marshfield v. Wisconsin Tel. Co.*, 7 Am. Electl. Cas. 103, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565;

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Krueger v. Telephone Co., 7 Am. Electl. Cas. 285, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298. Under such statutes, as construed by the cases cited, it was held by this court on the former appeal, in effect, that the relator had, as against the public, authority to occupy the streets of the defendant city, and to build and operate telephone lines therein, and to conduct the business of telephoning therein, and might construct and maintain any such lines, with all necessary appurtenances, from point to point upon or along or across any of such streets, "or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure," subject, however, to such conditions, restrictions and regulations as are or may be prescribed by law. In the opinion of this court on that appeal, Mr. Justice BARDEEN, among other things, said:

"The right to construct and maintain poles in city streets is as ample and positive as to build in the country highways, except that it may be subject to stricter police regulations, as will be more fully discussed in a subsequent portion of this opinion." 7 Am. Electl. Cas. 109, 111 Wis. 33, 86 N. W. 657.

And then, after discussing such police powers at some length, he further said:

"Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. . . . It has no authority to impose other conditions. That power rests in the Legislature. The power to regulate charges was not included in, or incidental to, the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

And in conclusion it is said that the relator "presented its petition, with a plan of its proposed improvements and extensions. It signified its willingness to submit to such changes as were deemed for the best interest of the city. It then became the duty of the city to take affirmative action. What that action should be, the court has no power to declare. It can only say 'act, and let such action be in harmony with the powers granted in the

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charter, as herein construed.'” Instead of so acting, the defendants, by the amended return, declare that they “have no power or authority to act contrary to sections 940c to 940i, so adopted by the qualified electors of the city November 6, 1900,” as mentioned in the statement of facts. The defendants further excuse their non-action by reason of the failure of the relator to bid for the franchises which the city was authorized to grant by virtue of such sections, and the resolution adopted by the common council August 15, 1901, as mentioned in the foregoing statement. But the relator has not obtained, nor sought to obtain, any franchise from the common council. As indicated, long prior to such action on the part of the city the relator had obtained such franchises and authority directly from the State, under the general statutes cited. Such statutes were not repealed, amended or suspended by such action on the part of the city November 6, 1900, and August 15, 1901. Nor were such franchises and authority of the relator in any way destroyed or impaired by such action on the part of the city. It follows that such amended return does not state facts sufficient to constitute a defense, or any legal justification for disobeying the command of the alternative writ of mandamus.

The order of the Circuit Court appealed from is reversed, and the cause is remanded, with directions to sustain the demurrer to the amended return, and for further proceedings according to law.

Use of Streets and Highways by Telegraph and Telephone Companies.

1. In general.
2. Municipal control.
 - a. In general.
 - b. Authority of municipality.
 - c. Reasonable use.
 - d. Legislative grant of franchise subject to municipal control.
 - e. Regulations must be reasonable.
 - f. Power of court to interfere.
 - g. Wires across highways where poles are erected on private lands.
 - h. Revocation of rights.

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3. Injuries to trees in highways.

4. Rights of abutting owners.

a. Conflict of authority.

b. Rural highways where title is in abutting owners.

1. **In general.**—It is a well recognized principle that the erection of telegraph and telephone poles in a street or highway, without legislative or municipal authority, is a public nuisance, which may be abated at the instance of an abutting owner, if the poles obstruct or prevent the free passage of carriages, horses or foot passengers. *Regina v. United Kingdom Elec. Tel. Co.*, 31 L. J. M. C. (Eng.) 156, 9 Cox C. C. 174. The right to use streets and highways for the purpose of erecting and maintaining telegraph and telephone poles and wires does not exist unless conferred by statute or ordinance. *Brown v. N. J. Telephone Co.*, 42 N. J. Eq. 141; *New York and New Jersey Telephone Co. v. East Orange*, 42 N. J. Eq. 490, 2 Am. Electl. Cas. 138.

It is well settled that the right to use the streets and other thoroughfares for the purpose of placing therein or thereon pipes, mains, wires and poles for the distribution of gas, water and electric lights for public and private use, is not an ordinary business in which any one may engage, but is a franchise belonging to the government, the privilege of exercising which can only be granted by the State or by the municipal government of the city, acting under legislative authority. *Grand Rapids Elect. L. & P. Co. v. G. R. Edison Elect. L. & F. G. Co.*, 2 Am. Electl. Cas. 152, 33 Fed. 152.

2. **Municipal control.**—*a. In general.* The right to erect telegraph and telephone poles and string wires thereon in the public streets and highways is controlled by statute, and subjected to the proper grant of authority by the municipality through which such poles and wires are erected. As stated in the case of *West. Union Tel. Co. v. Chicago*, 1 Am. Electl. Cas. 506, 16 Fed. 506, "A great city, notwithstanding telegraph lines may be an instrument of commerce, has the right to determine how, in what manner and upon what condition a telegraph company shall enter the city and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph, one with another." A municipality has the right and it is its duty to supervise and control the erection and maintenance of telegraph poles and wires within its limits. *Allentown v. West. Union Tel. Co.*, 4 Am. Electl. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070; *Consolidated Elect. Light Co. v. People's Elect. Light & Gas Co.*, 4 Am. Electl. Cas. 250, 94 Ala. 372, 10 South. 440; *West. Union Tel. Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wky. Notes Cas. (Pa.) 39.

b. Authority of municipality.—The authority conferred upon a municipality to grant to a person or corporation a right to erect telegraph or telephone poles in the public streets can only be derived from the Legislature by express grant or by necessary implication from powers expressly granted. *Domestic Telephone Co. v. Mayor, &c., of Newark*, 2 Am. Electl. Cas. 141, 49 N. J. Law, 344. In this case the court said: "The public easement in highways is vested in the public and can be divested by nothing short of an exercise of the sovereign power. Neither non-user nor adverse user will defeat

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the public rights. The Legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the Legislature may thus do, it may delegate authority to do. Thus, from the earliest history of the State, authority to vacate highways in country districts has been conferred on special tribunals. Like authority has frequently been conferred on municipalities. No reason appears why all such authority possessed by the Legislature may not be thus delegated. But the delegation of such power must plainly appear, either by express grant or by necessary implication."

It has been held that power conferred upon the common council of a city to license, tax and regulate telephone companies, carries with it power to grant permission to maintain the requisite appliances in streets. *Herschfield v. Rocky Mt. Bell Tel. Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883.

c. Reasonable use.—The use of a street in a reasonable manner and to a reasonable extent for the purpose of communication by telegraph or telephone is just and proper, and is within the uses to which the street may lawfully be put, when such use is sanctioned by the public through its duly authorized municipal agents. *McCormick v. District of Columbia*, 4 Mackey (D. C.) 396, 54 Am. Rep. 284; *Irwin v. Great Southern Tel. Co.*, 1 Am. Electl. Cas. 709, 37 La. Ann. 63; *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75; *Herschfield v. Rocky Mt. Bell Telephone Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; *Taggart v. Newport St. Ry. Co.*, 3 Am. Electl. Cas. 306, 16 R. I. 668, 19 Atl. 326; *People v. Kerr*, 27 N. Y. 188.

d. Legislative grant of franchise subject to municipal control.—Where a franchise is granted to a corporation by a legislative act, authorizing such corporation to transact business as a telegraph or telephone company, it will be assumed that the right of such corporation to use the public highways will be subject to municipal control and regulation. It was held in the case of *Monongahela City v. Monongahela Elect. Light Co.*, 4 Am. Electl. Cas. 53, 12 Pa. Co. Ct. R. 529, that all legislative grants to private corporations to occupy streets with electrical appliances are made impliedly, if not expressly, subject to the police powers of the municipality, both to dictate and to change the location of such plant. Where the Legislature has given a company a general grant to enter the streets of a city, the city, nevertheless, in the exercise of its police powers, can supervise and control the erection and maintenance of its poles and wires, and may even require a license for maintaining the poles upon the streets. *Philadelphia v. West. Union Tel. Co.*, 3 Am. Electl. Cas. 52, 11 Phila. (Pa.) 327; *West. Union Tel. Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wkly. Notes Cas. (Pa.) 39; *Lancaster v. Edison Elect. Illum. Co.*, 2 Am. Electl. Cas. 116, 8 Pa. Co. Ct. 178; *Suburban Light & Power Co. v. Boston*, 3 Am. Electl. Cas. 80, 153 Mass. 200, 26 N. E. 447. And a statute granting to certain electric corporations the right "to transact any business in which electricity over or through wires may be applied to any useful purpose," and conferring certain rights and privileges upon such cor-

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porations in the city of Baltimore, was held to merely grant a franchise to operate as electric companies in such city, subject, however, to the paramount right and power of the municipality to regulate and maintain the streets of the city for the use of the public. *Edison Electl. Illum. Co. v. Hooper*, 6 Am. Electl. Cas. 8, 85 Md. 110, 36 Atl. 113.

The dominant purpose of a street is for public passage, and any appropriation of it by a legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary rule is clearly expressed. *Hudson River Telephone Co. v. Waterliet Turnpike & Ry. Co.*, 4 Am. Electl. Cas. 275, 135 N.Y. 393, 32 N. E. 148; *City of Utica v. Utica Telephone Co.*, 7 Am. Electl. Cas. 67, 24 N. Y. App. Div. 361, 48 N. Y. Supp. 916 (in which case it was held that the right given by the N. Y. Transportation Corporations Law [L. 1890, ch. 566, sec. 102] to any telegraph or telephone company "to erect, construct, and maintain the necessary fixtures for its lines, upon, over or under any of the public roads, streets and highways," is subordinate to the power to control the streets, and remove or prevent encroachments, imposed upon the municipal authorities by the charter of the municipality). *City of Marshfield v. Wisconsin Telephone Co.*, 7 Am. Electl. Cas. 103, 102 Wis. 604 (where it was held that the right of a telephone company to occupy streets with its appliances, is subject to the provisions of a city charter that no obstructions shall be placed in streets without the direction and consent of specified municipal officers; and the fact that no ordinance upon the subject of obstructions has been enacted is immaterial).

The paramount authority over streets and highways is vested in the Legislature as the representative of the whole people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of general statutes. *Salem, City of, v. Anson*, 8 Am. Electl. Cas. 44, 40 Ore. 339, 67 Pac. 190.

e. Regulations must be reasonable.—Where the power of a corporation to exist for the purpose of transacting its business as a telephone or telegraph company, and to exercise its franchise of the use of the highways and streets as against the public, has been recognized and acted upon by a municipality, such municipality can control the exercise of such power in conformity with a just and reasonable administration of its police power, in the interests of the city and its inhabitants. Neither a city nor the State can destroy, or essentially modify, corporate franchises, except as the power is reserved in the original grant or by the constitution. They may regulate the mode of doing business with reference to the comfort, welfare and safety of society, but cannot, under the pretense of regulating, take away any of the essential rights and privileges which the charter confers upon the corporation.

The right to erect poles in a city street being granted by an act of the Legislature, a city cannot refuse its consent thereto on the ground that such right is a municipal franchise, or because the streets are already too much encumbered. The regulations adopted by a municipality controlling the use of the streets by a telegraph or telephone company should be reasonable

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and fair. They may control the location of poles and wires at certain places, but cannot fix telephone charges, or compel the company to sell the privileges to the city if the city shall so desire, or require the company to use its poles and connect with its exchange free of charge. *State ex rel. Wisconsin Telephone Co. v. Sheboygan*, 7 Am. Electl. Cas. 109, 111 Wis. 33, 86 N. W. 657. And in another leading Wisconsin case, *Wisconsin Telephone Co. v. Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, 40, it was held that a provision of a charter authorizing the common council to regulate, control and prohibit the location, laying, use and management of telegraph, telephone and electric light and power wires and poles authorized regulations in order to guard and secure the public safety and convenience, but such regulations, to be valid, must be reasonable and fair, and cannot go to the extent of confiscation, nor of wholly excluding such companies from the city. See also *Hannibal v. Missouri & Kansas Telephone Co.*, 2 Am. Electl. Cas. 146, 31 Mo. App. 146; *Hershfield v. Rocky Mt. Bell T. Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; *Michigan Teleph. Co. v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383.

The power to regulate and control vested in a municipality is limited to a proper exercise of its police power, and cannot be extended to the imposition of other conditions than those based on public convenience or safety. *Michigan Teleph. Co. v. City of Benton Harbor*, 7 Am. Electl. Cas. 9, 121 Mich. 512, 80 N. W. 386.

f. Power of court to interfere.—The power to regulate and control the exercise of a franchise in the streets by a telegraph or telephone company is a legislative or administrative function, and not a judicial one. The court has power to put the proper authorities in a city in motion to adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority. *Michigan Teleph. Co. v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383. See also *Marshfield, City of, v. Wisconsin Teleph. Co.*, 7 Am. Electl. Cas. 103, 102 Wis. 604, 78 N. W. 735; *Tuttle v. Brush Electl. Ill. Co.*, 1 Am. Electl. Cas. 508, 50 N. Y. Super. Ct. 508. In the case of *Western Union Teleg. Co. v. Champlain Elect. L. Co.*, 1 Am. Electl. Cas. 822, 14 Cin. L. Bull. 327, it was held that courts will not interfere with the exercise by municipal authorities of their power to regulate the erection and maintenance of wires in streets; but they will in a proper case, as between two parties maintaining electrical wires in the streets, restrain the one from so placing or using its wires as to injure the other.

The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of judicial power, so long as it is within the constitutional limitations. It may be exercised directly by the Legislature, or be delegated by that body to a municipal corporation; and when so delegated the municipality has, within the authority granted, the same rights and powers that the Legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of which has no limit, so long as it is within the objects and limits for which

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the power was conferred. *Salem, City of, v. Anson*, 8 Am. Electl. Cas. 44, 40 Ore. 339, 67 Pac. 190.

g. Wires across highways where poles are erected on private land.—In the absence of regulations fixing the height at which wires should be placed, municipal authorities have no right to molest the wires of a telegraph company strung across streets and highways, but suspended from poles standing on private land, so long as they do not interfere with the free use of such streets and highways for the purpose of travel. *American Un. Teleph. Co. v. Town of Harrison*, 1 Am. Electl. Cas. 291, 31 N. J. Eq. 627; *Summit, Town of, v. N. Y. & N. J. Teleph. Co.*, 7 Am. Electl. Cas. 58, 57 N. J. Eq. 123, 41 Atl. 146. And an English statute providing that "all streets being highways, shall vest in and be under the management and control of the vesting or district board of the parish or district in which such highways are situate," was held to refer only to the surface of the street, and so much above and beneath as was within the area of common user; and an injunction to restrain the erection and continuance of telephone wires stretched from chimneys upon private property across a street, not within the area of ordinary user, and shown not to be dangerous so as to be a nuisance, was refused. *Wandsworth Board of Works v. United Kingdom Teleph. Co.*, 51 Law T. (Eng.) 148.

But owing to the dangerous character of electric wires, and the fact that in a populous city they may seriously impede the efforts of firemen to extinguish fires, it is within the police power of a municipality to prohibit the suspension of such wires over or upon the roofs of buildings. *Electric Imp. Co. v. City of San Francisco*, 3 Am. Electl. Cas. 89, 45 Fed. 593.

h. Revocation of rights.—Where streets have been designated by municipal authorities upon which a telephone company may erect poles, and the company has expended money in erecting them, the permission cannot be revoked. *Hudson Teleph. Co. v. Jersey City*, 2 Am. Electl. Cas. 133, 49 N. J. Law, 303, 8 Atl. 123; *Newman v. Avondale*, 4 Am. Electl. Cas. 82, 31 Weekly Bull. (Ohio) 123.

A municipal ordinance granting to a particular company authority to construct and maintain telephone lines on the streets, without any limitation as to time, and for a consideration stipulated, when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract, which the city cannot thereafter abolish or alter in its essential terms, without the consent of the grantee. *New Orleans v. Great So. Teleph. & Teleg. Co.*, 2 Am. Electl. Cas. 122, 40 La. Ann. 41, 3 So. 533. See also in this connection, *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. (N. Y.) 358; *Commonwealth v. Boston*, 97 Mass. 555; *Michigan Teleph. Co. v. City of St. Joseph*, 7 Am. Electl. Cas. 1, 121 Mich. 502, 80 N. W. 383.

When permission has been given and wires strung in reliance thereon, the company has a franchise, subject only to the police power, not a mere license which can be revoked. *Suburban Elect. L. & P. Co. v. East Orange Township* (N. J. Ch.) 7 Am. Electl. Cas. 37, 59 N. J. Eq. 563, 44 Atl. 628.

In the case of *People ex rel. City of Pontiac v. Central Union Tel. Co.*, 192 Ill. 307, 67 N. E. 428, it was held that a municipal grant of a right to use

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streets for telephone poles, becomes, when the privileges granted are accepted, a binding contract between the city and the telephone company, which cannot be revoked or rescinded except for cause. (*Citing Chicago Municipal Gas Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Belleville, City of, v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.)

3. Injury to trees in highways.—As was held in the case of *Western Union Teleg. Co. v. Kreuger*, 8 Am. Electl. Cas. 214, 30 Ind. App. 28, 64 N. E. 635, an abutting owner who owns the fee upon which a highway is located is the owner of the soil and trees growing thereon. In respect to such trees, he has the rights and remedies of the owner of the freehold, subject only to the public easement. He may sue and recover damages for any unlawful injury to such trees by a telegraph or telephone company.

In Connecticut (Gen. Stats. sec. 3944) telegraph and telephone companies are required to so construct their lines as not to "incommode public travel or navigation, nor to injure any tree without the consent of the owner." In the face of such a statute a municipal board, having power to direct as to the location of telegraph and telephone poles and wires, and to compel a company owning the same to change their location, cannot authorize a telephone company to cut the trees in a highway without the consent of the owners of the abutting land. *Bradley v. Southern N. E. Teleph. Co.*, 6 Am. Electl. Cas. 152, 66 Conn. 559, 34 Atl. 449.

But the ownership of the trees by the abutting owner has been held to be a qualified and limited ownership, subordinate to the rights, powers and duties of the governing municipal body, in the protection, promotion and establishing of all public uses; therefore, a telephone company, invested by statute with the right of eminent domain, and authorized by law to maintain its poles and wires in the public streets, is not a trespasser in trimming the trees in a street in front of the property of an abutting owner, where such work is necessary to carry out the directions of municipal authorities as to a change in the location of poles and wires, and is done with the consent of such authorities and under the superintendence of one of the city officers. *Southern Bell Teleph. & Teleg. Co. v. Francois*, 6 Am. Electl. Cas. 160, 109 Ala. 224, 19 So. 1. See *Commonwealth v. Smith*, 6 Am. Electl. Cas. 167 n.

In the case of *Bronson v. Albion Teleph. Co.*, 8 Am. Electl. Cas. 177 (Neb.), 93 N. W. 201, it is held that where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys or injures such trees in erecting poles and wires under its franchise, is liable for the resulting damage, even though no unnecessary injury is inflicted.

The right to trim trees in the highways so as to permit the proper use thereof by telegraph and telephone companies is dependent, to a certain extent, upon whether or not such use is deemed an additional servitude. It has been held, where such use is not deemed such a servitude, that a telephone company, which has been given the right to erect poles and wires, has the right to remove branches of trees and other obstructions, provided such removal be necessary and be accomplished in a proper manner. *Wyant v. Cen-*

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tral Teleph. Co., 7 Am. Electl. Cas. 256, 123 Mich. 51, 81 N. W. 928. See also *Southern Bell Teleph. Co. v. Constantine*, 4 Am. Electl. Cas. 219, 61 Fed. 61.

In the following cases it has been held that an abutting owner is entitled to compensation for injury to trees in the highway. *Board of Trade Teleg. Co. v. Barnett*, 1 Am. Electl. Cas. 505, 107 Ill. 507; *Clay v. Postal Teleg. Co.*, 4 Am. Electl. Cas. 224, 70 Miss. 406, 7 So. 658; *McGruder v. Rochester St. Ry. Co.*, 4 Am. Electl. Cas. 224, 28 N. Y. Supp. 13; *Dailey v. Ohio*, 5 Am. Electl. Cas. 186, 51 Ohio St. 348, 39 N. E. 710.

4. Rights of abutting owners.—a. Conflict of authority.—There is an entire lack of harmony among the adjudged cases in this country as to the question of whether the use of highways by telegraph and telephone companies constitutes an additional servitude for which abutting owners must be compensated. The cases are ranged not very unequally on both sides. In the note to the case of *Nicholl v. N. Y. & N. J. Teleph. Co.*, 7 Am. Electl. Cas. 283, a number of cases are cited both for and against the proposition that such a use is an additional servitude. And in this volume it is held, in the case of *Bronson v. Albion Teleph. Co.* (Neb.), 8 Am. Electl. Cas. 177, 93 N. W. 201, that poles and wires which permanently and exclusively occupy portions of a public street or highway, constitute an additional servitude, for which the abutting owner is entitled to compensation in case he is damaged thereby. To the same effect is *Donovan v. Albert*, 8 Am. Electl. Cas. 11 N. D. 289, 91 N. W. 441; *Contra, Maxwell v. Central District & Printing Teleg. Co.*, 8 Am. Electl. Cas. 206, 51 W. Va. 121, 41 S. E. 125.

b. Rural highways where title is in abutting owners.—In New York a distinction seems to be made in the application of the rule as to compensation to owners of lands abutting upon rural highways, the title of which is retained by such owners subject to the public easement. It is there held that in a rural highway, the title to the center of which is in the abutting owner, subject to the public easement of travel, the erection and maintenance of telegraph poles and wires constitutes a new servitude, for which the abutting owner is entitled to compensation. *Eels v. American Teleph. & Teleg. Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133, 38 N. E. 202. But where the record title of the highway is not in the abutting owner, he cannot compel the removal of telephone poles from the highway, if they cause no substantial injury to any easement of light, air or access which he has in the highway. *Hallernan v. Bell Teleph. Co.*, 7 Am. Electl. Cas. 253, 64 App. Div. 41, 71 N. Y. Supp. 685.

The court in the case of *Eels v. American Teleph. & Teleg. Co.*, *supra*, recognized the fact that the easement in a public street in a city or village might well be enlarged by the necessities of the case, and it was careful to say that it neither decided nor intimated that "the defendant would or would not have the right to place its poles in the city street without compensation to the owner if he owned to the center of the street." In the case of *Castle v. Bell Teleph. Co.*, 7 Am. Electl. Cas. 261, 49 App. Div. 437, 63 N. Y. Supp. 482, the distinction was clearly drawn between urban and rural highways, and it was held that the placing of a conduit for telephone wires, beneath the sur-

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face of a street, the fee of which is in the abutting owners, to take the place of poles previously erected and used in the street, imposes no additional burden entitling such owners to compensation.

It has been generally understood in Pennsylvania that the abutting owner has a fee to the middle of the adjoining street, and that the public has a right of passage over it; but this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of a private right, so far as the use of a rural highway is concerned, might not be so in a city. *Lockhart v. Craig St. Ry. Co.*, 3 Am. Electl. Cas. 314, 139 Pa. St.419, 21 Atl. 26. In the classification of, and distinction to be drawn between city streets and rural highways, the courts have treated village streets as more analogous and akin to the former than to the latter. *Johnson v. N. Y. & Pa. Teleph. & Teleg. Co.*, 76 App. Div. 564, 78 N. Y. Supp. 598,



PART II

**EMINENT DOMAIN; RIGHTS OF ELECTRIC CORPO-
RATIONS IN HIGHWAYS; RIGHTS OF
ABUTTING OWNERS.**

(169)



EMINENT DOMAIN BY POWER COMPANY.

AVERY v. VERMONT ELECTRIC CO.

Vermont; Supreme Court.

1. **ERECTION OF DAM; WHAT CONSTITUTES PUBLIC USE.**—Under a statute (Vt. Stats., ch. 159), authorizing one who desires to erect or continue a mill or factory on his land to construct a dam to obtain water therefor, and to secure the right to overflow the lands of others, if commissioners appointed for such purpose, or the court itself, shall find “that the flowing of the land as proposed will be a public benefit,” a person who desires to erect such dam to procure power to generate electricity for the operation of a railroad, cannot invoke the power of eminent domain, since while the railroad must serve the public, there is nothing to compel such person to furnish electricity to the railroad, or to give equal advantages to all.

Appeal by petitioner from judgment dismissing petition for appointment of commissioners in *eminent domain* proceedings. Reported 56 Atl. 179; decided March 6, 1903.

Edmund C. Mower, for petitioner.

W. L. Burnap and *A. G. Whittemore*, for defendants.

Opinion by **MUNSON, J.:**

The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of fifty feet a dam now existing on said property, and proposes to use the water power so provided in generating electricity for the operation of the Burlington & Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of

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commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the constitution. The county court sustained the motion. No objection is taken as to the manner in which the question is raised. It is provided in chapter 159 of the Vermont statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purposes of this discussion, it will be assumed, without consideration, that a plant for the generation of electricity is a manufactory, within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of *eminent domain* under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our purpose, for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the petitioner's right by inquiring whether his case is within its terms. A more accurate statement of the question would be whether this is a public use, within the meaning of the constitution, for no finding of public benefit under the statute can avail unless the statute and the constitutional provision are brought together by construction. The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this court in *Re Barre Water Company*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195,

where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the State that the utilization of our water powers for its production ought to be regarded as a public necessity. We have in the petitioner's brief an extended presentation of the views expressed by other courts in dealing with the question of public use. In considering these opinions, it must be remembered that some States have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put it to the best use, and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the constitution of this State. Our only decision upon the flowage law is found in *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398. It was there held that the owner of a gristmill, who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It is said by the petitioner that that case is opposed to the decisions of most of the States which have passed upon the question, and this is true. But we find nothing in the arguments of other courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in *Lewis on Eminent Domain*, sections 178-181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are

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not a public use, within the meaning of the constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify, them. But it is said that the purpose of this condemnation is to provide motive power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this court in *Eldridge v. Smith*, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision in *Tyler v. Beacher* is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of *eminent domain* to every riparian owner for the maintenance of a mill or manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts, but the more recent doctrine of that State is that the provision is not an exercise of the right of *eminent domain*, but a statutory regulation of rights common to the riparian owners. It is insisted that the petition can be sustained on this ground. The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power

inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The courts of Massachusetts hold that the Legislature may secure the full value of the stream to the different owners by combining these two interests for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge REDFIELD in his note to *Allen v. Inhabitants of Jay* (in the American Law Register for August, 1873), 12 Am. Law Reg. (N. S.) 481, and sanctioned by the Supreme Court of the United States in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889. We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams. It is true that in *Johns v. Stevens*, 3 Vt. 308, Judge PRENTISS seems to assume that it would be within the power of the Legislature to encourage the building of mills by a statute of this character. But in *Adams v. Barney*, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge REDFIELD said that the land on the opposite side was the defendant's and that the plaintiff had no right to use it, and that no court or Legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill privileges through a statutory regulation of riparian rights. It should be noticed, also, that the argument advanced in support of the statute as thus classified is not coextensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable

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lands. A dam of moderate elevation may flood the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the State that can be flowed by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts court supports its position by holding that the mere flowing of land is not a taking of the property—a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words “public use” from the constitution.

Judgment affirmed.

TELEGRAPH AND TELEPHONE LINES IN HIGHWAYS; RIGHTS OF ABUTTING OWNERS.

BRONSON V. ALBION TELEPHONE CO.*Nebraska; Supreme Court.*

1. **ADDITIONAL SERVITUDE; COMPENSATION.**—Poles and wires which permanently and exclusively occupy portions of a public street or highway, constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby.
2. **INJURY TO TREES.**—Where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company, which removes, destroys, or injures such trees in erecting poles and wires under its franchise, is liable for the resulting damage, even though no unnecessary injury is inflicted.
3. **WHEN OWNER NOT ENTITLED TO INJUNCTION.**—In case property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law, and is not entitled to an injunction, unless upon proof of insolvency or some other special circumstance.
4. **PROOF OF FRANCHISE.**—It is sufficient for a corporation, which seeks to defend upon the ground of a franchise, to show that it is actually possessed of the franchise. Whether such franchise was acquired, or is held rightfully, is to be determined only in a direct proceeding to oust the corporation, or in a proceeding to which some one who claims a better title is a party.

(Syllabus by the court.)

Commissioners' opinion. Judgment for defendants, and plaintiff brings error.

J. A. Price, for plaintiff in error.

M. W. McGan, for defendants in error.

Bronson v. Albion Telephone Co.

Opinion by POUND, C.:

The plaintiff applied for an injunction to restrain defendant, a telephone company, from mutilating or injuring certain trees which she had planted in the street along and adjacent to her property. The trees had been planted under the provisions of a municipal ordinance, and were rightfully in the street, by virtue of sections 3-7, art. 4, ch. 2, and par. 24, sec. 69, art. 1, ch. 14, Comp. St. The company was erecting poles and wires under a franchise from the city. Upon demurrer to the petition, the District Court held that no cause of action was stated, and dismissed the suit.

The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized. In many jurisdictions it is customary. With us it has the sanction of express legislation. But this right is subject to all proper uses of the street for the primary purposes for which it was dedicated or condemned. Hence, although a telephone or telegraph company is undoubtedly liable for unnecessary or wanton injury to such trees in erecting its poles and wires, liability for injuries, even amounting to removal or destruction of the trees, which are necessary or proper in the due carrying out of the public undertaking, must depend upon the much-mooted question whether use of a street or highway for poles and wires is an ordinary use, within the contemplation of the parties when it was dedicated or condemned, or is a new and additional burden, for which the abutting owner is entitled to compensation in case of injury. The authorities are very evenly divided upon the question whether a telephone or telegraph company is liable to the owner of the trees, where the injury does not go beyond what is necessary in the reasonable prosecution of the work. Such liability is affirmed in *Daily v. State*, 5 Am. Electl. Cas. 186, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Telegraph Co. v. Barnett*, 1 Am. Electl. Cas. 565, 107 Ill. 507, 47 Am. Rep. 453; *Bradley v. Telephone Co.*, 6 Am. Electl. Cas. 152, 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; *Clay v. Cable Co.*, 70 Miss. 406, 11 South. 658; *McCrudden v. Railroad Co.* (Sup.), 28 N. Y. Supp.

1135. It is denied in *Wyant v. Telephone Co.*, 7 Am. Electl. Cas. 256, 123 Mich. 51, 81 N. W. 928, 47 L. R. A. 497, 81 Am. St. Rep. 155; *Telephone Co. v. Francis*, 6 Am. Electl. Cas. 160, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; *Telephone Co. v. Constantine*, 9 C. C. A. 359, 61 Fed. 61; *Dodd v. Traction Co.*, 5 Am. Electl. Cas. 201, 57 N. J. Law, 482, 31 Atl. 980. All of the cases first cited are from jurisdictions where poles and wires which permanently and exclusively occupy portions of the street or highway are held to constitute an additional burden. Of those last cited, *Wyant v. Telephone Co.* is from a jurisdiction wherein it is held that there is no additional burden in such cases. On the other hand, *Dodd v. Traction Co.* was decided in a jurisdiction where telegraph and telephone poles and wires are not regarded as ordinary uses of the highway; and in *Telephone Co. v. Francis* it is held that the right to remove trees in whole or in part, in the proper prosecution of such an enterprise, does not depend upon the question whether there is an additional burden, but follows from the paramount right of the public, to which the right to maintain the trees is subject, of removing such trees when necessary for public uses.

If this proposition is maintainable, we need not consider how far the poles and wires are an ordinary use of the street. But, in our opinion, it is not sound. The right to maintain the trees confers an additional value upon the abutting property. This value cannot be cut off without due compensation. When the public conferred it, a valuable property right was created. Relying upon the statutes and municipal ordinances pursuant thereto, owners have expended time and money in improving their property. This grant cannot be resumed, and the property thereby depreciated in value without compensation. Undoubtedly the grant in the first instance was subject to all ordinary uses to which the street might be put. But to say that it was subject to all public uses, whether ordinary or not, which might be deemed convenient thereafter, is going entirely too far. It becomes necessary, therefore, to decide whether telegraph and telephone poles and wires, which permanently and exclusively occupy portions of

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a public street or highway, constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby. The text writers are pretty well agreed that they do. Dill. Mun. Corp. sec. 698a; Elliott, Roads & S. 534; Lewis, Em. Dom. sec. 131; Rand. Em. Dom. 407. But Mr. Keasbey thinks it too soon to predict which view will prevail ultimately. Keasbey, Electric Wires in Streets and Highways, sec. 101. The adjudicated cases are ranged not very unequally on both sides. The following cases, among others, support the view that there is an additional burden: *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, and other decisions in New York; *Daily v. State*, 5 Am. Electl. Cas. 156, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Callen v. Light Co.*, 66 Ohio St. 166; 64 N. E. 141; *Telegraph Co. v. Barnett*, 1 Am. Electl. Cas. 565, 107 Ill. 507, 47 Am. Rep. 453; *Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390; *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859; *Nicoll v. Telephone Co.*, 62 N. J. Law, 733, 7 Am. Electl. Cas. 277, 42 Atl. 583, 72 Am. St. Rep. 666; *Telegraph Co. v. Williams*, 3 Am. Electl. Cas. 184, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908; *Telephone Co. v. Mackenzie*, 3 Am. Electl. Cas. 196, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219; *Stowers v. Cable Co.*, 68 Miss. 559, 9 South. 356, 12 L. R. A. 864, 24 Am. St. Rep. 290; *Krueger v. Telephone Co.*, 7 Am. Electl. Cas. 285, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298; *Cable Co. v. Irvine* (C. C.), 49 Fed. 113; *City of Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *Kester v. Telegraph Co.* (C. C.), 108 Fed. 926. The opposite view is supported by *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7 (decided by a divided court); *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258, 57 Am. Rep. 398, and other cases in Missouri; *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; *Cater v. Exchange Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; *Magee v. Overshiner*, 7 Am. Electl. Cas. 241, 150 Ind. 127, 49 N. E. 951, 40

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L. R. A. 370, 65 Am. St. Rep. 358; *Hershfield v. Telephone Co.*, 1 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; *Irwin v. Telephone Co.*, 1 Am. Electl. Cas. 701, 37 La. Ann. 63; *Hewett v. Telegraph Co.*, 2 Am. Electl. Cas. 222, 4 Mackey, 424. The question has been threshed over so many times that it would subserve no useful purpose to enter into an exhaustive review of these decisions. As Mr. Keasbey puts in very aptly, the crucial point is "whether the rights and privileges of the abutting owner in the use and maintenance of the street as such are affected." Keasbey, *Electric Wires in Streets and Highways*, sec. 102. At one time there was a tendency to attach some weight to the ownership of the fee of the street or highway; but it is becoming well settled, for obvious and convincing reasons, that that question is immaterial. *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Theobald v. Railway Co.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; Keasbey, *Electric Wires in Streets and Highways*, secs. 83, 102; Dill. Mun. Corp. sec. 698a. And this court is in accord with that view. *Jaynes v. Railway Co.*, 7 Am. Electl. Cas. 328, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. The case last cited involved an analogous question, and in passing thereon this court cited, with apparent approval, the decisions which hold telegraph and telephone poles and wires an additional burden. While the two cases are not in all respects the same, we think the position taken in *Jaynes v. Railway Co.* would be sufficient to turn the scale in this jurisdiction, if we were in doubt. We are of opinion on independent grounds, however, that such is the sounder view. When we recall the forest of poles, with their clumsy appurtenances, and the network of wires, and even cables, with which some of our city streets are incumbered, it seems hard to say that an owner whose light is cut off, who has the safety of his buildings and their occupants in case of fire endangered, and access to his property impeded, by these permanent obstructions, is less entitled to complain than one whose easement by adjacency is impaired by a steam railway. Of course, in the greater number of cases, the poles and wires work no substantial injury, and the owner has

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no ground of objection; but, because the damage in most cases is trivial or nominal, we should not be blind to the substantial and considerable damage that often exists.

It does not follow, however, that the plaintiff is entitled to an injunction. In case property is not taken or injured directly, so as to dispossess or otherwise immediately disturb the owner, but he suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner should be left to his remedy at law, which in such event is entirely adequate, and is not entitled to an injunction, unless upon proof of insolvency or some special circumstance. Such is the practice in cases where the construction of a railway causes damage to abutting owners. The abutting owners are not made parties to condemnation proceedings, nor can they enjoin construction of the road; but their remedy is in an action at law for damages. *Railroad Co. v. Fellers*, 16 Neb. 169, 20 N. W. 217; *Railway Co. v. Hazels*, 26 Neb. 368, 370, 42 N. W. 93; *Railroad Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637. The same remedy is employed where a city, in improving a street, impairs the easement of the abutting owner. *City of Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379. And it was adopted in *Jaynes v. Railway Co.*, *supra*. To hold otherwise would probably prevent many useful public improvements, since the Legislature has never made provision for condemnation of rights incidentally affected. Where nothing is actually taken, and there is merely an injury to the rights which the abutting owner has by reason of his situation, the courts generally refuse to grant an injunction, in the absence of some special circumstances. *Lorie v. Railroad Co.* (C. C.), 32 Fed. 270, and cases cited; *Maxwell v. Telegraph Co.* (W. Va.), 41 S. E. 125. In the case at bar, we see no reason why damages will not afford an adequate remedy. We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily

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afford him full compensation. If he has not, no opportunity for extorting an unreasonable settlement should be afforded him.

The petition alleges that the franchise under which the defendant is operating was granted by the city council to the mayor and one of the councilmen, by whom it was transferred to the company; and for this reason it is claimed that the grant is against public policy, fraudulent and void. If the franchise was wholly void, so that injury to plaintiff's property was threatened by mutilation of her trees without any warrant of law and by mere trespassers, a case for an injunction might be presented. But the most that can be said under the allegations of the petition is that the circumstances might possibly afford ground for revocation or for ousting the company in a direct proceeding for that purpose. The company is possessed of the franchise. Whether the franchise was acquired, or is held rightfully, is to be determined only in a direct proceeding to oust the company, or in a proceeding to which some one who claims a better title is a party. 5 Thomp. Corp. sec. 5340.

We, therefore, recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

Per CURIAM:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

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North Dakota; Supreme Court.

RIGHTS OF ABUTTING OWNERS; ADDITIONAL SERVITUDE; COMPENSATION; INJUNCTION.—The defendants were granted a franchise to construct and operate a telephone exchange in the city of Langdon. The defendants proceeded to perfect such system, and, in doing so, placed two telephone poles in the street in front of plaintiff's lot and residence, and in front of other lots belonging to plaintiff. One of these poles was set two feet from the sidewalk, and directly in front of a walk leading from the side-

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walk to the dwelling house. The defendants did not pay plaintiff for such use, nor offer to, nor did plaintiff consent to such use of the street. The streets and alleys of said city were given and dedicated for public use by the original proprietors of the town site. *Held*:

1. That the plaintiff is the owner of the fee in the street to the center thereof, except as conveyed to the public for street purposes.
2. That such a use of the street for telephone poles is not a street use, proper, and is a new burden or servitude thereon, inconsistent with the use of the street for travel.
3. That the franchise from the city council to defendants, granting them the privilege of constructing and maintaining a telephone system in said city, did not, and could not, authorize the occupancy of said street for such purpose, against plaintiff's consent, unless compensation was made to him.
4. That injunction is a proper remedy to prevent such use of the street until the constitutional provision in regard to compensation for taking or damaging property for public use has been complied with.

(Syllabus by the court.)

Appeal by plaintiff from judgment for defendant. Reported 11 N. D. 289, 91 N. W. 441; decided June 3, 1902.

Gordon & Lamb, for appellant.

Cleary & McLean, for respondents.

Opinion by MORGAN, J.:

The plaintiff brings this action and seeks to permanently enjoin the defendants from erecting telephone poles on the streets in front of his lots, situated in various blocks in the city of Langdon, N. D., and particularly described in the complaint, which is, in substance, as follows: That among other lots so described as being affected by the erection of such telephone poles, guy poles, cross-bars and wires is the lot on which is erected the dwelling house in which plaintiff resides; that two poles have been erected in the street in front of said lot, and that the erection of said poles at said places interferes with the ingress and egress to his said dwelling house, and interferes with his property rights in said street, and deprives him of light and air to which he is entitled, and that such poles and fixtures render the appearance of said

house unsightly, and tend to lessen its financial value and render it unsalable, and that such poles and fixtures will interfere with the growth of shade trees planted by him in close proximity to said poles; that said poles are thirty feet in height, and are placed in the ground at a distance of two feet from the sidewalk, and immediately in line of and in front of the walk leading from the sidewalk to his said dwelling house; that said poles and wires interfere or will interfere with his legal rights in several other lots owned by him in said city; that the defendants were granted a franchise by said city to construct and operate a telephone system in said city by an ordinance duly enacted by the city council thereof, and that said ordinance does not provide for any compensation to be given to owners of property abutting on the streets of said city, nor does it provide that condemnation proceedings shall be instituted and completed before such system is constructed, or at any other time; that the said poles were erected without his consent and without compensation to him, and therefore in violation of section 14 of the constitution of North Dakota, and of section 5933a of the statutes of said State. The demand for relief is that the defendants be temporarily and permanently enjoined from putting up any more poles on the streets on which plaintiff's lots abut, and from operating such telephone exchange, until defendants have made just compensation to plaintiff as required by the laws and the constitution of the State. The defendants answer by denying any damage to plaintiff's property, and further allege that they have undertaken the construction of a telephone system in the city of Langdon under the provisions of an ordinance of the city council granting them the right to do so under prescribed restrictions, and the poles and wires are erected under the supervision of the committee on streets and alleys, as appointed by said council, and in pursuance of said ordinance. The plaintiff applied for a preliminary injunction to restrain the defendants from proceeding with the erection of such poles and the operating of the telephone system until plaintiff had been duly compensated for damage done to his property. The trial court issued an order to show cause why the defendants should not be so restrained. A

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hearing was had upon such order, based on affidavits presented by the parties. On motion of the defendants, the order to show cause was dissolved and the preliminary injunction refused on the ground that the facts shown did not show that the plaintiff was entitled to the relief sought. The plaintiff has appealed to this court from such order denying his application for a preliminary injunction. The defendants contend in this court that the plaintiff is not entitled to relief by injunction, as he has a plain, speedy and adequate remedy at law, the defendants not being shown to be insolvent or unable to respond in damages. This question will be considered and decided after a decision of the other question in the case.

The main question involved—the use of the streets of a city for the poles and other equipments of a telephone system, without compensation to the owners of the lots abutting on the streets—is one of difficulty to determine, and one of vast importance and far-reaching consequences. Upon a question of such magnitude, and practical interest to almost every citizen of the State, as well as to almost every municipality, it is to be regretted by this court that counsel deemed it advisable to abandon the privilege of an oral argument, and to submit the questions raised on written briefs. However, the subject of the action is not a new one, and has frequently been before the courts of many jurisdictions. True, the decisions of such courts are not harmonious. Still, every phase of the principle contended for in this case has been affirmed in learned decisions by courts of the highest standing, and likewise disaffirmed by other courts of equal standing, in opinions showing equal ability and learning.

Before entering upon a decision upon the merits, a statement of a few material facts is advisable: The original plat of the city of Langdon, as filed by the original proprietors, dedicates and gives the streets and alleys of said city for public use. The ordinance of said city granting the telephone franchise to the defendants for fifteen years is silent upon the subject of compensation to abutting or other lot owners for damages by reason of the occupation of the streets by defendants for telephone purposes, and is silent as to

condemnation proceedings therefor. Under section 5956, Rev. Codes, the right of *eminent domain* may be exercised in behalf of several enumerated public uses; among them being telegraph and telephone lines. The question involved, as considered by this court, is that of the occupation of the streets by the defendants for telephone purposes, and not that of the direct or actual occupation of the plaintiff's lots by said company for said purposes, outside of street occupation. Certain conceded principles of law applicable to the questions involved in this case may be stated: The constitution of this State provides that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. The Legislature has the power by general laws, to regulate the uses to which the streets may be subjected as against the public. City councils in this State have been granted the power to regulate or prevent the use of the streets for telegraph and telephone poles. Section 2148, Rev. Codes. Prior to the adoption of the Code of 1895 the regulation of telephone systems and their construction was governed by section 3025, Comp. Laws, enacted in 1885. A telephone system is classed under the statute as one of public use. Section 5956, Rev. Codes. Chapter 35 of the Code of Civil Procedure provides that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and further provides the means and procedure under which such damages may be ascertained. The plaintiff in this case is the owner of the fee in the lot to the middle of the street, and entitled to the beneficial use thereof, subject to the easement or limited fee of the public in the street for its use for public purposes. In this case the absolute fee of these lots was never in the city, and it has simply an easement or a limited fee therein. In *Railway Co. v. Lake*, 10 N. D. 541, 88 N. W. 461, this court decided "that the public has only an easement in streets and highways, the fee remaining in the original owner or his successor, and that such owner may exercise such acts of ownership thereto as are not inconsistent with the easement." In that case there was no dedication by plat.

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In the case at bar there was one. However, in construing section 2422, Rev. Codes, which declares the effect of such dedications, we hold that a proprietor who dedicates by plat does not convey an absolute fee to the public, but reserves the whole estate and title, except the limited fee conveyed to the public for the designated and intended use.

The question to be decided on this appeal is, is the plaintiff entitled to recover damages from the defendants by reason of their placing telephone poles on the streets directly in front of his lots and residence? If these telephone poles are lawfully placed on lots which he owns subject to the easement of the public, and none of his rights have been violated, he is not entitled to damages. There must be some infringement upon his statutory or constitutional rights before compensation shall rightfully belong to him. If the city of Langdon and the defendants have pursued the course laid down by the law, and no constitutional right has been invaded, then the plaintiff has no just cause for complaint in any court. On examination of the question, with this principle in view, we find that the defendants were engaged in constructing this telephone system, and using the streets on which plaintiff's lots abutted, under the sanction of legislative authority. Defendants were granted a franchise to do this work, and the same could not, without difficulty and hardship, be completed without placing poles in the streets and alleys of the city. A telephone system is a public benefit to the people, although the objects of its construction in this and all other cases is that of private gain. The fact that the telephone is a public benefit and use does not give to the owners any right to occupy or use private property without the owner's consent, unless condemnation proceedings are regularly instituted and prosecuted to judgment. The fee title to the street in front of plaintiff's dwelling house being in the plaintiff, except for street purposes, he owns the lot to the middle of the street, subject to the rights of the public, to the same extent as he owns the portion of the lot on which his dwelling house stands. He alone is entitled to all uses of the lot, except the rights of the public by virtue of the dedication of the part in the street to the

public, but is entitled to no use thereof inconsistent with or antagonistic to the purposes and uses for which it was dedicated to the public. The plaintiff's right to the beneficial uses of the street, subject to the rights of the public, is a property right, entitled to the law's protection whenever unlawfully infringed on, and, like all property rights, is within the protection of the constitution. Dill. Mun. Corp. sec. 656. "The abutter has the exclusive right to the soil, subject only to the easement of the right of passage in the public, and the incidental right of properly opening the way for use. Subject only to the public easement, he has all the usual rights and remedies of the owner of the freehold." *Llloyd, Roads & S.* p. 519.

This brings us to the real questions in this case: To what public purposes were the streets originally dedicated? Is the use of the street for telephone posts and wires within the purposes of the original dedication to the public by the original proprietors?

The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text writers, that "motion is the primary idea of the use of the street." The defendants claim that the use of the street for telephone poles is within the use contemplated, as it facilitates the transmission of intelligence, and makes intercommunication between persons possible without the use of the street, and thus lessens travel by persons on the streets, and thereby renders travel thereon free from the annoyance and inconvenience of crowded streets. There is force in the contention, and several courts have adopted the view that the use of poles for such purposes is within the purpose of the original dedication, and therefore not a new use nor an additional burden on the street, because such use pertains to travel on the street. That it lessens travel on the street is admitted. That, however, is hardly the test.

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The question is, does it lessen travel on the street by such means as cause a permanent obstruction of the street for a purpose not within the original dedication? The plaintiff is entitled to free access to his house, and to light and air for his house, without obstruction. If, for any public purpose inconsistent with the grant to the public of the use of the street, the street is obstructed in front of his lot abutting on such street, such use entitles him to compensation. If within the original purpose, and he is not obstructed in gaining access to his lot or building, and not deprived of light or air, he is not entitled to relief or to compensation. The city had the right to authorize the defendant to construct a telephone system in the manner described, if it did not infringe upon any of the property rights of the plaintiff to the street by virtue of his ownership of the lot. Neither the city council nor the Legislature could deprive the plaintiff of compensation for his property rights in such lot, if the telephone poles set thereon are not a use of the street, within the purposes for which the easement was originally conveyed to the public. The Legislature cannot deprive the plaintiff of his property rights without his consent and without compensation. The constitution prohibits such taking or damaging of his property, even for public purposes, without first procuring his consent or first compensating him. The Legislature may authorize the use of the easement of the public in the street, but not to the damage of the owners of real estate fronting on such street, unless condemnation or consent or compensation is first made or given. The streets of said city were given to the public for public use. What is understood by "public use?" The primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions. The new modes of travel must not interfere with the property rights of the abutting owner, nor with the use of the street in all other ways by the public, as contemplated or existing at the time

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the dedication or later. The fact that the statute designates the telephone as a public use does not authorize the use of the streets by it without restriction. If the use of the telephone on the streets interferes with travel, or is inconsistent with the use of the streets for travel, as originally dedicated, or is injurious to the property rights of abutting owners, the Legislature may authorize it to be placed on the streets, but cannot in any manner deprive the abutting owner of his property rights, nor deprive him of the right to compel payment for the use or damage of his property.

The courts have frequently passed upon the question whether the use of the streets for telephone purposes is an additional servitude or burden to that understood as a proper street use. Those holding that it is not a street use, in its proper acceptation, are: *Krueger v. Telephone Co.* (Wis.), 7 Am. Electl. Cas. 285, 81 W. 1041, 50 L. R. A. 298, that court says:

"A street may subsist, and the lot owner have the complete use of his adjacent property. Not so if a portion of the street has been permanently taken up by poles or other necessary structures for a telegraph or telephone line. No doubts but that private rights are affected by the construction and maintenance of such a line in a way entirely different from the ordinary use of the highway. Nor is there room to dispute the fact that such construction constitutes a permanent occupancy of the land, independent of the public use. This occupancy being for the direct benefit of private corporations, and only for the indirect benefit of the public, how can it be said, with any show of justice, that when land is condemned for a street the public must not only pay for its use, but also for the use of such *quasi* public corporations as the legislature have given the power to use the highway."

In *Eels v. Telegraph Co.*, 5 Am. Electl. Cas. 92, 143 N. Y. 33, 38 N. E. 202, 25 L. R. A. 640, that court said, in a case involving the use of a rural highway:

"We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as a newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity,

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or in the manner, method, or means of locomotion. . . . Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession,—a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway.”

In *Telegraph Co. v. Barnett*, 1 Am. Electl. Cas. 535, 107 Ill. 507, 47 Am. Rep. 453, that court said:

“In the same sense the construction of a line of telegraph on the highway is an additional servitude to which the fee of the land had not been before subjected. The servitude differs more in degree than in character, and, whether the damages are great or small, the corporation asking for or appropriating to itself the benefit of such new servitude must make just compensation to the owner of the fee.”

In *Telephone Co. v. Mackenzie*, 3 Am. Electl. Cas. 196, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219, the court said:

“To what extent, then, does the statute justify the action of the appellant, and protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the Legislature has declared that it shall not be, but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude without making appropriate provision for just compensation to the owner.”

In *Jaynes v. Railroad Co.* (Neb.), 7 Am. Electl. Cas. 328, 74 N. W. 67, 39 L. R. A. 751, that court said:

“It is very generally held that telegraph and telephone poles in city streets or rural highways entitle the abutting property owner to compensation. . . . The principle upon which all these cases rest is the sound one that the highway or street is dedicated to the public to pass and repass thereon, and that the erection of poles in the streets by the telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and to that extent is a continued obstruction of the street.”

In *Telegraph Co. v. Smith* (Md.), 18 Atl. 910, 7 L. R. A. 200, that court said:

“A telegraph or telephone company is subject to the provisions of Const. Md. art. 3, sec. 40, which provides that private property shall not be taken for public use without just compensation; and the averment in a bill for injunction that such a company is proceeding, or threatens to proceed, to construct its lines of poles and wires over complainant’s land without his leave,

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and without paying or tendering him compensation, is sufficient to entitle him to an injunction."

In *Telegraph Co. v. Williams* (Va.), 3 Am. Electl. Cas. 184, S. E. 109, 8 L. R. A. 429, 19 Am. St. Rep. 908, that court said:

"It is true that the use of a telegraph company is a public use. That company is a public corporation, as to which the public has rights which the law will enforce, but these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. It is for the private profit of the corporation. . . . There is no reason in law or in common justice why it should not pay for what it needs in the prosecution of its business."

In *Stowers v. Cable Co.* (Miss.), 9 South. 356, 12 L. R. A. 64, 24 Am. St. Rep. 290, that court said:

"A city cannot grant to a telegraph company the right to erect its line along a public street without first making compensation to the abutting property owners, since the line is an additional burden."

In *Broome v. Telephone Co.* (N. J. Ch.), 2 Am. Electl. Cas. 59, 7 Atl. 851, it is said that—

"It is enough to say on that head that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned."

In *Halsey v. Railway Co.*, 3 Am. Electl. Cas. 283, 47 N. J. Eq. 380, 20 Atl. 859, the court said:

"And this principle exhibits in a very clear light the reason why it has been held that the placing of telegraph and telephone poles in a street imposes an additional servitude upon the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence."

In *Metropolitan Tel. & Tel. Co. v. Colwell Lead Co.*, 1 Am. Electl. Cas. 662, 67 How. Pr. 365, that court said:

"I am clearly of the opinion that such a use of the street is not a street use, and does not come within the terms of the trust upon which the city holds

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the fee, and that, so far as the rights of the abutting owners are involved, the Legislature has no power to authorize plaintiffs to use the street for such purpose."

Joyce, Electric Law, sec. 321, says:

"After a careful examination of the cases in which this question has arisen, and of the many thorough discussions contained in the opinions of such cases, and of the rules of law applicable thereto, we are of the opinion that the construction of telegraph and telephone lines upon the highways or streets is not within the original purposes of the dedication or taking of the same, and that the poles and wires constitute an additional servitude entitling the original owner to compensation."

2 Dill. Mun. Corp. sec. 698a:

"On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof."

Lewis, Em. Dom., says:

"The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed on the land."

Elliott on Roads and Streets says:

"We are inclined to the opinion that such a use constitutes a new burden for which the owner of the fee is entitled to compensation."

Croswell on the Law of Electricity (sec. 110) says:

"The use of the highways, however, for the transmission of intelligence, is a use wholly different from public travel. Incidentally, no doubt, it affects somewhat similar objects. . . . The nature of the use, however, is essentially different, and the courts have generally recognized this difference."

See, also, as favoring the same principles, *Cable Co. v. Irvine* (C. C.), 49 Fed. 113; *Daily v. State*, 5 Am. Electl. Cas. 186, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep.

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8; *Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 2, 62 Am. St. Rep. 390.

The following cases are authority for a doctrine directly the reverse of that enunciated in the cases and text-books cited: *Peo- v. Eaton*, 5 Am. Electl. Cas. 87, 100 Mich. 208, 59 N. W. 145, L. R. A. 721; *Pierce v. Drew*, 1 Am. Electl. Cas. 571, 136 Mass. 75, 49 Am. Rep. 7; *Cater v. Exchange Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. Rep. 543; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258, 57 Am. Rep. 398; *Hershfield v. Telephone Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; *Magee v. Pershiner* (Ind. Sup.), 7 Am. Electl. Cas. 241, 49 N. E. 951, L. R. A. 370, 65 Am. St. Rep. 358.

This brings us to the final question in the case: Is the plaintiff entitled to an injunction? The defendants contend that he is not, because he can resort to an action for damages, and thereby be fully compensated for whatever damages he has or may suffer. That such is the general rule is, without doubt, true. It is also a general rule that a wide discretion is vested in trial courts when granting or refusing preliminary injunctions, and that appellate tribunals will hesitate before interfering with the exercise of such discretion by trial courts. But we have reached a conclusion that the facts of this case place it beyond the application of these ordinary rules. The defendants are proceeding to damage the plaintiff's property without first complying with a mandatory provision of the constitution. That provision of the constitution is peremptory that property taken or damaged for public use shall first be paid for, and the Legislature has also enacted that payment must precede the taking or damage, and has provided adequate means for establishing the amount of such damages. The taking of or damaging of private property for public use without the owner's consent is deemed so serious that payment therefor is a prerequisite to attempting to do so. The defendants have the ultimate right, under their franchise, to use the street for telephone purposes; but payment of damages, actual or consequential, to plaintiff's property, must be first attended to. This does not mean that it may

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first be appropriated and paid for at the end of a suit for damages, but means that payment must precede the taking or damaging. Judge BREWER, in *McElroy v. Kansas City* (C. C.), 21 Fed. 261, said:

"When the defendant has the ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was great or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined."

In *Searle v. City of Lead* (S. D.), 73 N. W. 913, it is said:

"But the framers of our organic law deemed it proper to fully protect the rights of the abutting property owner in the Constitution itself, and not leave him to the 'sense of justice' by which a community is supposed to be governed. . . . The constitutional provision is unquestionably a wise and just one, and well calculated to protect property owners from injustice and wrong on the part of municipal or other corporations or individuals invested with the privilege of taking private property for public use, and should be given a liberal construction by the courts in order to make it effectual in the protection of the rights of the citizen."

The principles enunciated in these cases are equally as applicable to the facts of the case at bar as to the facts of those cases, and the right to a preliminary injunction was sustained in each of them. "When, however, an action is had for this purpose, there must be kept in view that general as well as reasonable and just rule that whenever, in pursuance of law, the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. . . . So, if a statute vests the title to lands appropriated in the State or in a corporation, on payment therefor being

made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title." Cooley, Const. Lim. p. 654. See, also, *Adams v. Railway Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; *Theobald v. Railway Co.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; *City of Omaha v. Kramer* (Neb.), 41 N. W. 295, 13 Am. St. Rep. 504; *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Church v. School Dist.* (Wis.), 13 N. W. 272.

Under these cases, and the principles there sustained, we hold that the occupancy of the plaintiff's property for the purposes intended was a violation of the rights of the plaintiff guaranteed him by the constitution and the statutes, for the prevention of which a preliminary injunction should have been granted. The possession taken for such purposes was in the nature of a continuing trespass. A multiplicity of suits must necessarily follow before adequate compensation could be awarded for such continued invasion of plaintiff's property rights. In view of these considerations, the remedy at law would be inadequate. 1 High, Inj. sec. 708; *Krueger v. Telephone Co.* (Wis.), 7 Am. Electl. Cas. 285; 81 N. W. 1047, 50 L. R. A. 298. It is contended that to grant preliminary injunctions in such cases will seriously retard public improvements and delay the advantages to be derived therefrom to the public. We do not understand that it would to any serious extent. If those desiring to use private property for public use will follow the provisions of the law and the constitution, before endeavoring to use such private property, the delays or difficulties will be but slight.

Our conclusion is that the placing of the poles in the street in front of plaintiff's dwelling house in this case is an occupancy of the street inconsistent with the dedication of the street for the use of the public for travel; that it constituted an additional burden or servitude upon the street, not within the purposes of the dedication; that the public has an easement in the street for travel, and passage thereon by any means not inconsistent with the rights of abutting property owners; that the placing of these poles in this street is an interference in some degree with travel on the street,

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and also encroaches upon the plaintiff's right to the free and unincumbered use of such street for all purposes.

We are not convinced by the argument advanced that the rights of the public and of abutting owners should be subjected to the occupancy of the streets for all public purposes under the new appliances of modern invention, which greatly facilitate communication between citizens of the same city or citizens of different cities. If the persons utilizing these new appliances were the only ones whose rights and interests were to be considered, there could be but one answer to the demand for a liberal construction of the terms of the grant for public use. But on the one hand are the interests of those asking for the unrestricted use of the streets for intercommunication, and the unlimited use of the streets for all such purposes without compensation. On the other hand is the demand of the abutting property owner that his property be not sacrificed to such uses without compensation. His demand is safeguarded by the constitution expressly providing that his property shall not be taken or damaged without his consent and without compensation. We think the plaintiff's rights are within the provisions of the constitution. We are aware that plaintiff's damages cannot be large in the present case. But if two poles may be erected on this street in front of his residence, why not twenty? We cannot sanction the violation of a constitutional provision because the damages may seem insignificant. The constitutional protection is not to be meted out in cases where pecuniary damages are large, and denied if they are small. The protection should follow a violation of any right therein defined. Some of the cases cited pertain to setting of poles in rural highways for telegraph purposes. A distinction is apparent between the use of a rural highway and a street, and is sometimes claimed between the use of the telephone and the telegraph. The cases are cited as analogous in principle to the case at bar. The decision, however, is not intended to cover any questions save the one involved, and that is the use of the telephone as set forth in the pleadings in this case, and any case cited not strictly in point is

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cited as argumentatively sustaining the contention advanced by plaintiff.

The order of the District Court refusing a preliminary injunction is reversed, and that court is directed to grant the temporary relief demanded in the complaint. All concur.

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North Dakota; Supreme Court.

1. **ERECTION OF TELEPHONE POLES IN STREETS; RIGHTS OF ABUTTING OWNERS; EMINENT DOMAIN.**—The defendant telephone company was authorized by ordinance to construct, maintain and operate a telephone line along the streets of the city. It was contended by the appellant-plaintiff that the defendant could not erect such poles along the street in front of his premises without making compensation to him for the damages sustained by reason thereof. It was held that the constitutional provision as to taking private property for public use does not apply to the use of the streets of a city for the purposes for which they were dedicated, appropriated or condemned; the construction of a telephone system along the streets of a city imposes no additional servitude upon the owners of the abutting property, and such owners are not entitled to compensation for any damages they may sustain by reason of the construction of such system.
2. **USE OF STREETS FOR TELEPHONES.**—A telephone is but a step in advance of former methods of conveying intelligence and information, and is a substitute for the messenger and carrier of former times; the use of the street for the purpose of a telephone system is not an unusual and improper one, and does not, therefore, constitute an additional servitude, although such use may not have been known when the streets were dedicated, appropriated or condemned for street purposes.

Appeal of plaintiff from an order vacating a preliminary injunction. Decided November 11, 1903; reported 97 N. W. 3.

Joe Kirby, for appellant.

Aikens & Judge, for respondent.

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Opinion by CORSON, J.:

This is an appeal from an order dissolving a temporary injunction, and the question presented for our consideration is, does the erection of a telephone system in the streets of a city constitute an additional servitude, not imposed by the original appropriation, dedication, or condemnation of the streets for public use, for which the abutting property owners are entitled to compensation? It is alleged in the plaintiff's complaint and admitted by the answer that the plaintiff is the owner of two lots fronting on Duluth avenue, in the city of Sioux Falls, on which he resides, and that between the sidewalk fronting said premises and the curb line he has improved the ground by planting shade trees and shrubs thereon, and by converting the same into a grass plat or lawn, under the ordinance adopted by the city council of the said city. It is further alleged that the defendant, at the time of the filing of the plaintiff's complaint and the issuance of the temporary injunction, was proceeding to erect telephone poles and construct its telephone system along the said street, and was proceeding to erect a telephone pole within the plat so improved by plaintiff as aforesaid, thereby damaging the property of the plaintiff, rendering it less valuable and desirable as residence property, without making or tendering to the plaintiff any compensation for the damages sustained by him.

It seems to be conceded that the defendant was authorized by an ordinance of the common council of the said city, if the city was authorized to adopt such an ordinance, to construct, maintain, and operate a telephone line along the streets of that city. It is contended by the appellant that under the constitution of this State it was not competent for the authorities of the city to grant to the defendant the right to erect poles and construct and maintain a telephone system along the streets of that city, and that, if it had authority to grant such right, the defendant could not erect the same without making compensation to the abutting property owners for the damages they might sustain by reason of the construction of such telephone system. Section 13, art. 6, of the State Constitution, reads as follows: "Private property shall

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not be taken for public use, or damaged without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken." Section 18, art. 17, provides that compensation shall be made before any property "is taken, injured, or destroyed." These provisions of the constitution do not apply to the use of the streets of a city for the purposes for which they were dedicated, appropriated, or condemned. The authority of the city to grant to the defendant the right to erect, maintain, and operate a telephone system is clearly granted by the provisions of section 3, ch. 141, p. 208, Laws 1885, now constituting section 554 of the Revised Civil Code of 1903, and which section reads as follows:

"There is hereby granted to the owners of any telephone or telegraph lines operated in this State, the right of way over lands and real property belonging to the State, and the right to use public grounds, streets, alleys and highways in this State subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. . . ."

This section seems to have remained in force since it was enacted in 1885.

Upon the main question that is presented for our determination the authorities are not in harmony, and any attempt to reconcile them would be useless. One line of authorities holds that the construction of telephone systems along the streets of cities imposes no additional servitude upon the abutting property owners, and that said owners are not entitled to compensation for any damages they may sustain by reason of the construction of such system. The other line of authorities take the view that such a system creates or imposes upon the abutting property owners an additional servitude, for which they are entitled to compensation for such damages as they may sustain. After a careful examina-

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tion of these authorities, we have arrived at the conclusion that the decisions of the courts taking the former view are not only sustained by the greater weight of authority, but by the better reasoning, and should be followed. The streets of a city or incorporated town are, in contemplation of law, dedicated, appropriated, or condemned for all proper street uses; and, when a street is used for any proper street purpose by permission of the city authorities, such use does not constitute an additional servitude, though such use may not have been known when the streets were dedicated, appropriated, or condemned for street purposes, and the abutting fee owner is not entitled to compensation for any damages he may sustain by reason of such use. The streets of a city are now used for many purposes unknown in former times. A century ago or less there was practically no use of the streets for sewers, laying of water and gas pipes and operating street railways, but with the advance of civilization and the improved conditions of society these uses have become a necessity, and recognized by the courts, and quite generally held as not adding any new servitude to the abutting fee owner for which he is entitled to compensation. The telephone is but a step in advance of former methods of conveying intelligence and information, and is a substitute for the messenger and carrier of former times. In speaking upon the subject of street railways, Judge Cooley, in his work on Constitutional Limitations, says:

"When land is taken or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving." Cooley's Con. Lim. sec. 556.

With the advance of civilization and new discoveries in science and new inventions a more varied use of the streets of a city has become a necessity, and the rights of fee owners must yield to the public good, and the new uses and more appropriate methods

must be deemed to have been compensated for in the appropriation, dedication, or condemnation of the streets.

In *Pierce v. Drew*, 138 Mass. 75, 49 Am. Rep. 7, the Supreme Court of that State, in speaking upon the subject, uses the following language:

"When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travelers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. *Commonwealth v. Temple*, 14 Gray, 69, 77. . . . When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travelers, to some extent, limited by those privileges necessary for its use. *Commonwealth v. Temple, supra*; *Attorney-General v. Metropolitan Railroad*, 125 Mass. 515, 28 Am. Rep. 264. The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out."

In *Julia Building Association v. Bell Telephone Company*, 1 Am. Electl. Cas. 801, 88 Mo. 258, 57 Am. Rep. 398, the Supreme Court of Missouri, in an able and exhaustive opinion, arrives at the conclusion that the erection of a telephone system upon the streets of a city is not an additional servitude for which the abutting fee owners are entitled to damages, and that such use is but an improved method of transmitting intelligence, and a substitute for other well-known methods. In that case the court says:

"These streets are required by the public to promote trade and facilitate communications in the daily transaction of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living or doing

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business on the other end, or at any intermediate point, he is entitled to the use of the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously, and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street, through these means, would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage."

This case is directly in point, as the telephone company was proceeding to erect a telephone pole through the covering and into an excavation specially made by the fee owner in front of its premises.

In *Cater v. Northwestern, etc., Co.*, 5 Am. Electl. Cas. 111, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543, the Supreme Court of Minnesota says:

"The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath. In a slightly more advanced state it included the idea of a way for pack animals. . . . And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those in use."

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In *People v. Eaton*, 5 Am. Electl. Cas. 87, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721, the Supreme Court of Michigan says:

"When these lands were taken or granted for public highways, they were not taken or granted for such uses only as might then be expected to be made of them by the common method of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country or the discoveries of future times might demand. . . . It would be a calamity to the State if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set."

This view is also approved by the Supreme Court of Montana in *Hershfield v. Rocky Mountain, etc., Co.*, 4 Am. Electl. Cas. 73, 12 Mont. 102, 29 Pac. 883; by *Castle v. Bell Tel. Co.*, 7 Am. Electl. Cas. 261, 49 N. Y. App. Div. 437, 63 N. Y. Supp. 482; by *Lockhart v. Railway Co.*, 3 Am. Electl. Cas. 314, 139 Pa. 419, 21 Atl. 26; by *Johnson v. N. Y. & P. Telephone & Telegraph Co.* (Sup.), 78 N. Y. Supp. 598; by the Supreme Court of the District of Columbia in *McCormick v. District of Columbia*, 54 Am. Rep. 284; and by the Supreme Court of Indiana in *Magee v. Overshiner*, 7 Am. Electl. Cas. 241, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358, which may be regarded as the leading case upon this side of the question. In that case there is a full review of the opposing decisions, and that learned court, as its conclusion, says:

"The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of communication of messages between persons within the city than the telegraph. We conclude that the reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude for which the abutting property owner is entitled to compensation. Nor do we agree that the ordinary pole and wires are necessarily a special injury to the enjoyment of the abutting property."

The decision in that case, however, was prior to the decision of the Supreme Court of North Dakota in *Donovan v. Allert*, 91

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N. W. 441, 58 L. R. A. 775, in which the learned court arrived at a different conclusion. The latter case is largely relied on by the appellant in support of his contention, but the reasoning of the court in that case does not meet with our approval.

It may be proper to state in conclusion that, while a telephone company is authorized to use the streets of a city for the purpose of constructing, maintaining, and operating its telephone system, it must exercise the right in such a manner as not to cause unnecessary injury or inconvenience to property owners.

The order of the Circuit Court vacating and setting aside the preliminary injunction is affirmed.

FULLER, J., taking no part in the decision.

MAXWELL V. CENTRAL DIST. & PRINTING TELEG. CO.

West Virginia; Court of Appeals.

1. **ABUTTING OWNERS NOT ENTITLED TO DAMAGES; INJUNCTION.**—The erection of telephone poles along the streets of an incorporated city, town or village, with the consent of the council thereof, is not such a taking of private property for public use as will authorize the abutting lot owners to enjoin the prosecution of such work until his damages occasioned thereby are paid or secured to be paid. Such a privilege is a mere easement, carved out of, subservient, and appurtenant to the public easement in such street.
2. **DESTRUCTION OF PUBLIC IMPROVEMENT.**—Before an individual or company may invade and destroy, in whole or part, for other public purposes, a public improvement placed on the street by an abutting lot owner in front of his property, under agreement with the council of the city, town, or village, specific authority for so doing must first be obtained from such council.
(Syllabus by the court.)

Appeal by defendant from judgment for plaintiff. Decided March 8, 1902; reported 51 W. Va. 121, 41 S. E. 125.

John Bassel, for appellant.

Davis & Davis and *M. F. Snider*, for appellee.

Opinion by DENT, P.:

W. Brent Maxwell, a citizen and resident of the city of Clarksburg, and owner and occupier of a lot fronting 180 feet on the south side of Pike street, along which, by agreement with the common council, he had constructed a sawed stone pavement, on the 5th day of July, 1901, obtained an injunction from the Circuit Court of Harrison county enjoining and restraining the Central District & Printing Telegraph Company from erecting or maintaining any telephone pole or poles upon the sidewalk or stone pavement in front of his property, or stringing wires thereon, for the reason that the same would be a taking of the fee in the land occupied without just compensation, would create a public nuisance or obstruction in the thoroughfare, specifically mar the beauty of his property as a residence, render it less accessible, and irreparably damage it without legal authority so to do. The plaintiff presented, as a part of his bill, an ordinance of the city council adopted September 24, 1890, granting to the defendant "the privilege of constructing, equipping and maintaining lines of poles and wires upon and along the streets and alleys of the town for telegraph and telephone purposes," and claimed the same was void from the fact that it was adopted prior to any legislation authorizing the council to grant such privilege. The act was passed in —, 1891. The plaintiff also presented an order of the County Court granting such privilege as to the roads and highways of the county; but, as the County Court has no control over the streets and alleys of the city of Clarksburg, such order can have no bearing on the determination of this case, and must be regarded as unnecessary surplusage. The defendant appeared and answered the bill, admitting that it was about to erect two telephone poles in front of plaintiff's premises, as claimed, by virtue of said ordinance of the council; that for upward of 10 years it had telephone lines extending through the thoroughfares of the city, but that, "in order to accommodate the public and furnish proper facilities for intercourse by means of telephone lines, respondent has been compelled to equip and maintain a more sufficient line than that first erected in said city; and, in order to effect this purpose, respondent sent its engineers to Clarksburg,

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and had a line laid off and mapped in and through said town, and respondent's engineers found that the line could be better located and made more efficient by changing it or transferring it from the north to the south side of Pike street, which necessarily compelled its location in front of the property of the plaintiff." Defendant then moved to dissolve the injunction, as the bill presented no grounds for equitable interference. The motion was overruled, and defendant appeals.

The first question presented by the appeal is as to whether the erection of a telephone line along a public thoroughfare is such a taking, within the meaning of the Constitution of this State, as will authorize the reversioner (supposed to be the lot owner) to maintain an injunction until just compensation has been or secured to be paid. The decisions of other States are very conflicting and unsatisfactory on this question. They may be found collated and commented on in the case of *Kreuger v. Telephone Co.*, 7 Am. Electl. Cas. 285, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298. Many of these decisions have little or no application to the law of this State, as they are mere judicial fictions, invented for the purpose of securing to an abutting lot owner damages to his property caused by street improvement or use for other public utilities than travel. A resort to such fictions is not necessary in this State, for the reason that the Constitution secures to the abutting lot owner such damages as may be sustained by him because of public improvements of any kind; not by injunction, however, but by action at law, unless the damages are so great as to amount to a virtual taking of his property. *Mason v. Bridge Co.*, 17 W. Va. 396; *Spencer v. Railroad Co.*, 23 W. Va. 406. In the fourth point of the syllabus of the latter case, it is held that "if a railroad company, with the consent of a town council, builds its road through a street of a town, the fee of the ground on which the street is located being in the adjoining owners of lots, the railroad company does not take the property of such lot owners, but only an easement from such town council,—a simple right of way, so long as the council has an easement in such ground to use it as a street." In *Watson v. Railway Co.* (W. Va.), 39 S. E.

193, the same conclusion is reached as to street railways. The same law is applicable to telephone lines. The telephone company takes nothing by its grant from the town except a simple right of way so long as the council has an easement in the land to use it as a street. While it may obstruct to some extent the public easement out of which it is carved, it in no sense takes anything from the owner of the fee that has not already been taken from him when the land was dedicated to public use. Telephonic communication, though maintained by private capital, is a great and rapidly increasing public utility. It is an immense saver of time and money, and often life. It also relieves the public thoroughfares of much of their burden of travel,—far more than the space occupied compares with the residue of the public highways. As its facilities increase, its public utility, necessity and cheapness of operation will also increase, until its benefits are appreciated and enjoyed by all. It will prove a great aid in the administration of justice, the prevention of crime, and the spread of civilization, as it will bring all mankind into easy speaking distance of each other. Telephone poles are not things of beauty, yet their utility is so great that their ugliness must be endured until human invention has discovered some more tasteful substitute for them. The public can well afford to surrender a reasonable portion of the public easement in its highways to a public utility of such vastly increasing importance. As the owner of the fee in such highways loses nothing thereby, he has no grounds of complaint. It puts no additional burden on the fee, but it is a burden alone upon the permanent easement, to which it is appurtenant and subservient. It may, however, be a damage, to a greater or less extent, to the abutting lot owner. For this he has his suit at law, unless such damage be equivalent to the actual taking of his lot. No such damage is pretended, and the injunction is not predicated thereon.

The only other question worthy of consideration presented by this record is as to whether the plaintiff is entitled to enjoin the erection of such telephone poles as a public nuisance specially damaging his property. If the defendant was clothed with proper legal

authority to erect such poles, although they may be a specific damage to plaintiff's property, and he be entitled to sue therefor, he could not maintain his injunction. For that which is lawful for a person to do cannot be enjoined as a nuisance. On the other hand, if the defendant has failed to show legal authority for its conduct, the plaintiff is entitled to his injunction. *Cook v. Totten* (W. Va.), 38 S. E. 491; *McEldowney v. Lowther* (W. Va.), 38 S. E. 644. For authority defendant relies solely on the ordinance passed by the council September 24, 1890, as ratified by the act of the Legislature enacted 1891. This act provides "that when any company desires to erect telephone poles along any street of any incorporated city, town or village, the consent of the council of such city, town or village shall be first obtained." Acts 1891, p. 297. As heretofore shown, the ordinance grants the defendant the privilege of "constructing, equipping, and maintaining lines of poles and wires upon and along the streets and alleys of the town for telegraph and telephone purposes." This is a general grant, without designating the streets or alleys along which such lines were to be erected. The defendant, acting thereunder, erected its lines throughout the city, and has maintained them for 10 years. According to the allegations of its answer, it now wishes to change the location of its lines and poles, especially in front of plaintiff's property, without further consent from the council. The council have the right to control the location of the defendant's poles and lines, as the mutual interest of the public and defendant may demand. But it cannot surrender the control of the streets by a general ordinance to the defendant, so as to permit it to locate and relocate its lines from time to time, *ad libitum*, without regard to the interests of the public or private citizens. If the defendant has once located its poles and lines by virtue of the original ordinance under the supervision and direction of the council, it cannot relocate and change such lines and poles without first having the consent of the council to do so. It is the duty of the council to superintend and preserve as far as possible the rights of all parties in the public thoroughfares, of which it is the mere custodian or trustee; and when a person claims the right to invade and destroy,

in whole or part, a public improvement for public use, erected by another at private expense by agreement with the council, such person should be armed with explicit authority from the council for so doing, and a general privilege to erect telephone poles and lines along such streets, granted long years previous to such improvement, furnishes no such authority. The council authorized the plaintiff to lay an expensive stone pavement along the front of his property for the use of the public at his own expense. While done at his expense, it is public property, and the council has the right to authorize the defendant to invade such sidewalk and destroy the same in part for the setting of its poles, and also to destroy or injure the shade trees along or over the same; yet the defendant may not do so without the consent of the council first obtained. Having the prior consent of the council, the defendant may do so, and, if the plaintiff is damaged thereby, he may have recovery thereof by action at law. The defendant having failed to show the consent of the council first obtained to invade and injure the plaintiff's authorized improvement, the court committed no error in continuing the injunction until such consent was shown or obtained.

The decree is affirmed.

As to rights of abutting owners to compensation for the use by telegraph and telephone companies of the streets and highways in front of their premises, see note entitled, "Use of streets and highways by telegraph and telephone companies," *ante*, page 159. See also the following notes in the preceding volumes of this series: Vol. VII, pp. 285, 424, 429; vol. VI, p. 151; vol. V, pp. 119, 184, 206; vol. IV, pp. 145, 217, 224; vol. II, pp. 228, 268, 306, 320, 348. Upon this subject see also, Keasbey on Electric Wires, secs. 89, 90.

Damages for obstruction to light, air and access.—Whether or not a telegraph or telephone line is a new burden on the land dedicated to public use as a street or highway, the owner has the right to compensation for any substantial obstruction to his light, air or access. Keasbey on Electric Wires, sec. 105. In the case of *Krueger v. Wisconsin Telephone Co.*, 7 Am. Electl. Cas. 285, 106 Wis. 96, 81 N. W. 1041, it was held that where a telephone pole is placed in front of the property of an abutting owner in such a manner as to interfere with his proper enjoyment thereof, and without his consent, he is entitled to damages and to the removal of said pole. But in this case the court based its conclusion upon the principle that the erection of telephone

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poles and wires in a street constitutes an additional burden. It is likely that the rule existing where an electric railway is operated and maintained in a street, to the effect that if the poles and wires of the railway interfere with ingress and egress to the property of an abutting owner and thus diminish its value, the owner is entitled to compensation, applies equally to the erection of poles by telephone, telegraph and electric light companies. *Jaynes v. Omaha St. Ry. Co.*, 7 Am. Electl. Cas. 328, 53 Neb. 682, 74 N. W. 67; *Zehren v. Milwaukee Elect. Ry. & L. Co.*, 7 Am. Electl. Cas. 345, 99 Wis. 83, 74 N. W. 538. In the case of *Clausen & Sons Brew's Co. v. B. & O. Telegraph Co.*, 2 Am. Electl. Cas. 210, it was held that abutting owners have a right to the free use of light, air and access to their land, and this not only as to present but as to possible future uses. A telegraph pole, five feet in circumference, erected in front of premises abutting a city street, was, under the circumstances, deemed to be an interference with the right of access. Whether the erection of poles in a given case is a substantial impairment of the abutting owner's easement in light, air or free access to and from the street, is a question of fact. See *Tiffany v. U. S. Ill. Co.*, 1 Am. Electl. Cas. 629, 67 How. Pr. 73.

In the case of *Russ v. Pa. Telephone Co.*, 5 Am. Electl. Cas. 109, the erection of a telephone pole in a street in front of the door to a building of the abutting owner, in such a position as to interfere with the use of such building, was restrained by injunction. In the case of *Prentiss v. Cleveland Telephone Co.*, 5 Am. Electl. Cas. 125, 32 Law Bull (Ohio) 113, it was held that while a municipal corporation has the right to use its streets in every way needful for the proper operation of its fire alarm service, such use must be reasonable, with due reference to modern appliances and inventions in ordinary use; the maintenance of large and unsightly poles in a street used exclusively for residential purposes for the support of only two wires is an unreasonable use.

In New Jersey telegraph and telephone companies are granted the power to acquire by condemnation the right to use public roads for poles and wires in cases where the owner of the soil refuses to consent to such use, by virtue of the act of March 11, 1880 (P. L. 1880, p. 201). This power is not impaired by the act of March 19, 1900 (P. L. 1900, p. 74), amending sec. 8 of the telegraph companies act of 1875. The act of 1900 designates the procedure to be followed in such condemnation. In such procedure the petition need not be authenticated by the corporate seal, nor need an effort be made to obtain the consent of a mortgagee of the soil when the owner refuses to consent. *Coles v. Midland Teleph. & Teleg. Co.*, 67 N. J. Law, 490, 51 Atl. 448.

Telephone company deemed a telegraph company within the meaning of a statute providing for the incorporation of a telegraph company and authorizing such a company "to construct lines of telegraph along and upon any of the public roads, streets, lands or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments for sustaining the cords or wires of such lines" (Act of April 29, 1874, sec. 33), and the several acts supplementary thereto. *People's Teleph. & Teleg. Co. v. Berks & Dauphin Turnpike Road Co.*, 199 Pa. St. 411, 49 Atl. 284. The court said:

"The provisions of these several acts of assembly apply to telephone companies as well as to the telegraph companies. Judge Rice, in *Central Pennsylvania Telephone & Supply Co. v. Wilkesbarre & W. S. Ry. Co.*, 4 Am. Electl. Cas. 260, 11 Pa. Co. Ct. R. 418, says: 'A telephone is now regarded as a species of telegraph; hence it has been held that a statute applicable to the incorporation of telegraph companies may be deemed to apply to telephone companies, although the latter are not named.' Judge Simonton, in *Com. v. Pennsylvania Tel. Co.*, 42 Leg. Int. 180, held that a telephone company incorporated under the act of 1874, and its supplement of 1876, is a telegraph company, within the meaning of the revenue act of 1879. In 25 Am. & Eng. Enc. Law, p. 746, it is stated that, 'as a rule, a statute concerning telegraphs, in the absence of special controlling conditions, may apply to telephones as well.' And this rule is sustained by a number of citations in the notes on the same page. That the highways of the State are within the control of the Legislature is well settled. The Legislature has full power and jurisdiction over the highways of the State, and may consent to their use, by legislative enactment, for the purposes of telephone lines, as a means to facilitate communications in the daily transactions of business, not only between the citizens of the same community, but of citizens of one community with those of another, and thereby accommodating the public at large. The defendant company's turnpike road was located and constructed by virtue of legislative enactment and for public purposes, and, as we said in *Northern Cent. Ry. Co. v. Com.*, 90 Pa. 306: 'It differs from a common highway in the fact that it is not constructed in the first instance at the public expense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway.' A turnpike road can be constructed and opened under authority of law only. When used by the public it becomes a public highway. *Pittsburgh, M. & Y. R. Co. v. Com.*, 104 Pa. 583. Judge RICE, in *McManus' Appeal*, 5 Pa. Super. Ct. 65, says: 'Nothing is better established than that a turnpike road is a public highway, and every traveler has the same right to use it upon payment of toll established by law as he would have to use any other public highway.'"

Western Union Teleg. Co. v. Kreuger.

WESTERN UNION TELEG. CO. v. KREUGER.

Indiana; Appellate Court, Division No. 1.

1. **TREES IN HIGHWAYS; RIGHTS OF OWNER OF FEE.**—An abutting owner who owns the fee upon which a highway is located is the owner of the soil and the trees growing thereon; in respect to such trees he has the rights and remedies of the owner of the freehold, subject only to the public easement.
2. **COMPLAINT IN ACTION FOR INJURY TO TREES.**—A complaint in an action against a telegraph company for injury to trees, alleging that the trees were wrongfully cut by the defendant's servants, without stating the business engaged in at the time the injury was done, or which does not allege that the plaintiff had any rights in the highway other than that of egress and ingress, is insufficient.

Appeal by defendant from judgment for plaintiff. Decided June 24, 1902; reported 30 Ind. App. 28, 64 N. E. 635.

Lowden, Estabrook & Davis, for appellant.

C. R. & J. B. Collins, for appellee.

Opinion by ROBINSON, J.:

Appellee avers in his complaint that he is the owner and in the lawful possession of "lot number 11 in Cheney's subdivision of parts of sections 28 and 33, in township number 38, range 4 west, containing 11 and 37-100 acres; also a strip of land one hundred and seventy-three feet wide off of the east end of lot 10 in Cheney's subdivision of parts of said sections 28 and 33, township 38, range 4 west, containing 4 and 4-100 acres, all situate in said county and State, and by reason thereof, during all the time aforesaid, was and still is lawfully entitled to the use and enjoyment of the public highway adjoining and adjacent to said above-described real estate, and to the shade, shelter, protection, and ornament and use and benefit of certain trees, to wit, twelve trees growing in and upon the said highway; that the defendant, through its agents, servants, and employees, on the day above stated and on divers other days and times between that day and the commencement of this action,

wrongfully and unlawfully cut and destroyed said trees, by means whereof the plaintiff has been deprived of the shade, shelter, protection, ornamentation, use, and benefit of said trees so cut, to his damage in the sum of five hundred dollars." A demurrer for want of sufficient facts was overruled, and issue was formed upon the general denial. Trial by jury, verdict and judgment for appellee for \$200.

The complaint does not show that the trees were cut by appellant in the construction of its telegraph line, or that the cutting of the trees had any connection with the maintenance or operation of any telegraph line. The averment is that they were wrongfully cut by appellant's servants, to appellee's damage. Appellant is sued as a corporation, but it is not averred what business, if any, it was engaged in when it did the act complained of. Appellee's rights, so far as disclosed by the pleading, are not different from what they would be had a private person wrongfully and unlawfully cut and destroyed the trees. If the trees were cut by appellant under a claim of a right to do so in order to properly construct or maintain and operate a telegraph line, that would be matter of defense. So that whether appellant would have a right to cut trees which it claimed interfered with the operation of its line constructed upon plans of its own adoption, or whether it might be required to construct and maintain its line, if practicable so to do, so as not to interfere with trees belonging to the abutting owner and growing upon the highway, are questions not presented by the demurrer, and upon these we decide nothing. If the trees were the property of appellee, or if they were property to which he was entitled to the possession, a right of action accrued to him, under the averments of the complaint, for their wrongful destruction.

An abutting proprietor, who owns the fee in land upon which a highway is located, is the owner of the soil, and of trees growing thereon and of mines and quarries thereunder, so far as such ownership is not inconsistent with the public use. The municipality alone has the right to these, only in so far as they are necessary in the construction and maintenance of the way for the public use. Such an abutting proprietor, as to shade trees growing in front of

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his property and upon land the fee of which he owns, has the rights and remedies of the owner of a freehold, subject only to the public easement. See *Clark v. Dasso*, 34 Mich. 86; *O'Connor v. Telephone Co.*, 22 Can. Sup. Ct. 276; *Daily v. State*, 5 Am. Electl. Cas. 186, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Lyon v. Gormley*, 53 Pa. 261; *Weller v. McCormick*, 52 N. J. Law, 470, 19 Atl. 1101, 8 L. R. A. 798; *Baker v. Shephard*, 24 N. H. 208; *Bliss v. Ball*, 99 Mass. 597; *Board v. Beckwith*, 10 Kan. 603; *Overman v. May*, 35 Iowa, 89; *Crismen v. Deck*, 84 Iowa, 344, 51 N. W. 55; *Haas v. City of Evansville*, 20 Ind. App. 482, 50 N. E. 46; *Coburn v. New Telephone Co.*, 7 Am. Electl. Cas. 270, 156 Ind. 90, 59 N. E. 324; *Magee v. Overshiner*, 7 Am. Electl. Cas. 241, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358; *Board of Com'rs of Hamilton Co. v. Indianapolis Nat. Gas Co.*, 134 Ind. 209, 33 N. E. 972; *Julien v. Woodsmall*, 82 Ind. 568; *Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Elliott, Roads & S.* (2d Ed.) sec. 690; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Bolling v. City of Petersburg*, 3 Rand. 563; *Town of West Covington v. Freking*, 8 Bush. 121; *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477. But the complaint fails to show that appellee had any rights in the land upon which the highway is located other than those belonging to the general public, and a right of ingress and egress. He would be entitled to the use and enjoyment of a highway adjoining and adjacent to his land whether the opposite abutting proprietor owned the servient estate, or he owned it himself, or if the municipality held the fee in trust for public uses. The effect of the averment is that appellee is entitled to the use and benefit of the trees growing upon the highway because he is an abutting proprietor. Were we permitted even, in aid of the pleading, to indulge the presumption that an abutting proprietor owns to the center of the highway, the complaint would still fail to show that the trees were located upon the part owned by appellee.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

Southwestern Telegraph & Telephone Co. v. Branham.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. BRANHAM.

Texas; Court of Civil Appeals.

TRIMMING TREES INTERFERING WITH TELEPHONE WIRES; RIGHTS OF OWNERS.—

A telegraph and telephone company cannot, by its agents, enter the premises along a street or highway, in which its wires are strung, without the consent of the owner of such premises, and trim off the branches of trees growing on such premises which interfere with its wires. In such a case the owner of the premises is entitled to damages for the injury done.

Error brought by defendant from judgment for plaintiff. Reported 74 S. W. 949; decided May 16, 1903.

McLaurin & Wozencraft and W. S. Bramlitt, for plaintiff in error.

Ed. R. Bumpass, for defendant in error.

Opinion by RAINEY, C. J.:

Suit by defendant in error to recover of plaintiff in error the value of two shade trees destroyed by the servants of plaintiff in error. Plaintiff in error, by virtue of a grant from the city of Terrell, erected poles and strung its wires thereon along the edge of the sidewalk in a public street in said city, and in front of the premises of defendant in error, which abutted on said street, and on which defendant in error resided. Defendant in error had growing on said premises, and within his enclosure, two large shade trees, the branches of which extended over the sidewalk and came in contact with the wires of plaintiff in error, and thereby impaired the usefulness of the same. During the years of 1901 and 1902 the employes of plaintiff in error, without the consent of defendant in error, and over his protest, entered upon said premises, climbed said trees with spurs, puncturing therewith the bodies of said trees, and trimmed off some of the branches thereof, which caused said trees to wither and die, to defendant in error's damage the value thereof, to wit, the amount of the judgment herein.

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The contention of plaintiff in error is that "the defendant company, having acquired the right from the municipality of Terrell, Tex., to construct, operate, and maintain its lines of wires and poles along, upon and over the streets of said city, for the purpose of maintaining a telephone system in the service of the public, would have the right, in the exercise of ordinary care, to remove all developing or growing limbs of trees, which had by such growth come in contact with its wires, so as to interfere with or destroy the purpose for which such wires were constructed and to be used." Without entering into a discussion of the respective rights of the abutting property owners and public corporations to the use of sidewalks along a street, we will confine ourselves to the mere statement that plaintiff in error had no right to enter the premises of defendant in error, without his consent, and injure his trees in the manner it was done, as shown by the evidence, and escape liability for the damages done. *Telegraph & Telephone Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704; *Tel. Co. v. Hunt* (Tenn.), 1 S. W. 159, 57 Am. Rep. 237.

Other assignments of error are presented; but the evidence clearly showing that defendant in error was entitled to recover, and the evidence being sufficient to show that he was damaged to the extent of the verdict, we deem it unnecessary to discuss the other contentions raised.

The judgment is affirmed.

Trimming trees growing on private premises.—A telephone company has no right, under a license from village authorities permitting it to erect its line in a street and cut away limbs of trees that might be in the way, to enter private premises and cut off the limbs of a tree standing thereon, without the consent of the owner of such premises. *Memphis Bell Telephone Co. v. Hunt*, 2 Am. Electl. Cas. 282, 16 Lea (Tenn.) 282. It cannot be said that the limbs of trees on private property which overhang the highway are nuisances for the reason that they interfere with the stretching of telegraph or telephone wires along the street, and such limbs are not removable as nuisances by the company erecting such wires, especially where it appears that the poles could have been located in another part of the street. *Tissot v. Great Southern Telegraph & Telephone Co.*, 2 Am. Electl. Cas. 286, 39 La. Ann. 996, 3 So. 261.

In the case of *Gilchrist v. Dominion Teleg. Co.*, 3 Rugs. & Bar. (Can.) 553, it was held that a telegraph company in defending an action for damages be

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of unlawful injury to trees located upon abutting land to a highway, allege and prove that the injury to the trees was absolutely necessary for the purpose of constructing its lines along such highway. But in the case *Wadd v. Consol. Traction Co.*, 5 Am. Electl. Cas. 201, 57 N. J. L. 482, 31 1880, the court held that a traction company authorized by the city to erect poles in the city streets has the right to top the branches of trees overhanging the street when such act is reasonably necessary for the passage of its cars.

Where an agent of a telegraph company acting within the scope of his authority, enters upon land adjacent to a highway and cuts trees which in his opinion are dangerous to the telegraph line, the company is liable in damages for the trespass, if he errs in the exercise of his discretion and unnecessarily removes the trees. *W. U. Tel. Co. v. Satterfield*, 2 Am. Electl. Cas. 96, 34 Ill. 386.

A superintendent of a telephone company desiring to trim ornamental trees located on adjacent land, was told by a man near the premises that he owned the land and that he might cut the trees. Acting upon this permission of the supposed owner the superintendent caused the trees to be cut. The man was not the owner. The company had poles of sufficient height to clear the trees which might have been used. It was held that there was sufficient evidence of negligence to warrant the submission to the jury of the question of punitive damages. *Poston v. Cumberland Teleph. & Teleg. Co.*, 5 Am. Electl. Cas. 203, 94 Tenn. 696, 30 S. W. 1040.

A franchise conferring upon an electric light company the right to erect its poles and wires in the highways does not authorize the company to remove or mutilate trees of an abutting owner in the absence of existing necessity; and if its purpose can otherwise be accomplished without resorting to extraordinary means, though with inconvenience and greater expense, such necessity does not exist. *Van Siclen v. Jamaica Elec. Light Co.*, 7 Am. Electl. Cas. 45, 45 N. Y. App. Div. 1, 61 N. Y. Supp. 210, aff'd 168 N. Y. 650.

Trees in streets and highways.—As to the trimming of trees located within the highway for the purpose of permitting a proper use of the highway by an electric company, see note "Use of Highways by Telegraph and Telephone Companies," *ante*, p. 159. See also the following cases reported in previous volumes of this series: *Southern Bell T. & T. Co. v. Constantine*, 4 Am. Electl. Cas. 219, 69 Fed. 61; *Dailey v. State of Ohio*, 5 Am. Electl. Cas. 186, 51 Ohio 348, 37 N. E. 710 (holding that an owner of land adjoining a public highway, whose title extends to the center of the road, who has cultivated shade trees, planted partly on his own land and partly in the line of the highway, within the bounds of his deed, has the property interest in such trees and the right to their enjoyment subject only to the convenience of public travel); *Branham v. Eastchester Elec. Co.*, 5 Am. Electl. Cas. 199, 80 Hun, 290, 30 N. Y. App. 125; *Southern Bell Teleph. & Teleg. Co. v. Francis*, 6 Am. Electl. Cas. 10, 100 Ala. 224, 19 So. 1.

USE OF STREETS BY ELECTRIC LIGHT COMPANIES.

McWETHY v. AURORA ELECT. L. & P. CO.*Illinois; Supreme Court.*

1. **RIGHT TO RESTRAIN USE OF STREET BY ELECTRIC LIGHT COMPANY.**—A statute (Hurd's Ill. Sts. 1899, ch. 24, par. 491, p. 358), which limits the right of a municipal council to grant franchises for the use of the streets to cases where the owners of more than one-half of the lands fronting on said streets have consented thereto, and provides that such owners may enjoin the use of the streets by a company which has not complied therewith, does not apply except in cases arising thereunder, and does not therefore authorize an injunction where an electric light company is exercising a franchise granted prior to the statute.
2. **USE OF STREETS BY ELECTRIC LIGHT COMPANY WHERE FEE IS IN CITY.**—Where the fee to public streets is in a municipality, it may authorize private corporations or individuals to erect electric light poles on its streets and stretch wires thereon, for the purpose of furnishing light for the use of the municipality and its citizens, provided they do not materially obstruct the use of the streets for public travel.
3. **EQUITY WILL NOT INTERFERE BY INJUNCTION.**—Where the question involved is the legality of an ordinance granting a franchise for the use of the streets, equity will not interfere in behalf of an abutting owner to enjoin proceeding under the ordinance until such question is determined, but will remit him to his remedy at law.
4. **FRANCHISE TO COMPANY NOT YET ORGANIZED.**—An abutting owner cannot raise the question that at the time the franchise was granted the company was not yet organized. Such an ordinance may be premature and irregular, but the defect may be waived by the acceptance of the franchise by the company.

Appeal by complainants from judgment of appellate court (104 Ill. App. 479) reversing a decree in their favor. Decided April 24, 1903; reported 202 Ill. 218, 67 N. E. 9.

Albert J. Hopkins, Fred A. Dolph, Robert Bruce Scott, and David J. Peffers, for appellants.

Murphy & Alschuler, for appellee.

Opinion by WILKIN, J.:

Complainants' cause, as presented by their counsel, rests upon the following propositions: First, "appellants, as abutting property owners, have the right to enjoin a construction and a use of the street for purely private commercial purposes, as distinguished from a construction or a use of the street to facilitate public travel, such as for street railways, hacks, steam railroads, etc., and especially is this so in view of the provisions of an act entitled 'An act to prescribe the conditions,' etc., 'for lighting and heating purposes by cities,' etc., 'and providing a remedy for the property owner,' etc.;" second, "an ordinance purporting to grant rights to a corporation is not valid where the corporation was not in existence at the date of the grant;" third, "an ordinance is void which was both presented and passed at the same meeting of the city council, where there is in force a rule of the city council providing that all ordinances shall lie over for one week after being presented and read;" and, fourth, "where a grant to a corporation provides that before beginning work on any street it shall have a permit therefor from the city electrician and the superintendent of streets, and with the concurrence of the streets and alleys committee of the city, the corporation cannot lawfully commence such construction without such permit."

The maintenance of the first of these propositions is essential to the right to maintain this bill, and upon which the correctness of the decision below must turn. The statute therein referred to is an act in force July 1, 1897, consisting of a single section. Hurd's Rev. St. 1899, p. 358, chap. 24, par. 491. That section, after providing that the city council, or the president and board of trustees of villages and incorporated towns, shall have no power to pass an ordinance granting certain privileges except upon the petition of the owner of the lands representing more than one-half of the frontage on the street or alley, etc., provides:

"Any person being the owner of or interested in any lot fronting on any street or alley, or part thereof, as is sought to be used for any or either of such purposes, shall have the right, by bill in chancery, in his or their own name, to enjoin any person or corporation from using such street or alley, or

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part of street or alley, for either of such purposes, under any grant by the city council or board of trustees, which is not made in conformity with the provisions hereof, and the sufficiency of the petition herein required shall be ascertained by the court in which such bill in chancery may be filed."

It will be seen that this statute does not purport to authorize abutting property owners generally to maintain bills in chancery to restrain the creation of obstructions in public streets, but simply provides a remedy for a violation of the provisions of that act. This bill shows on its face that the defendant was not claiming the right to place the alleged obstruction in the street under an ordinance passed since that enactment. We are unable to perceive upon what principle the complainants can invoke that statute as authorizing them to bring the present bill. The section must be considered as a whole, and so construed, the provision relied upon can have no application to privileges granted before its adoption.

It is assumed in the first of the above propositions that placing in a public street poles upon which to string electric wires for lighting purposes is for a purely private commercial purpose, distinguishable from the building of street and steam railroads, the use of hacks, etc. That it is a different use is true, but that it is, in principle, distinguishable from the other obstructions mentioned, or that it is for purely private commercial purposes, is not true, as shown by this record. The poles were not being placed in the street for private commercial purposes alone, but were intended to serve the same purpose as lamp-posts or other means of conducting light to the streets and inhabitants of the city residing thereon, which are public and proper uses. *Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. Rep. 400. That the company would derive gain from their use in no way distinguishes them from street railways or other means of public travel. In all such uses private gain accrues to the individual or corporation operating them. Since the discovery and use of electricity for lighting purposes, it has generally, if not universally, been held that, the fee to public streets being in a municipality, with general power to regulate the use of the same, such municipality may lawfully authorize private corporations or individuals

rect electric light poles on its streets, and stretch wires upon them, in order to provide lights for its own use and that of its citizens, provided that in doing so they do not materially obstruct the ordinary use of the streets for public travel. This right is widely recognized in *Chicago Tel. Co. v. Northwestern Tel. Co.*, 8 N. E. 329. In *State v. McWethy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 101 L. R. A. 369, 56 Am. St. Rep. 515, the Supreme Court of that State uses the following clear and comprehensive language:

The power to regulate the use of streets is very comprehensive. 'The word regulate' is one of very broad import.' . . . Under the power thus delegated it cannot now be questioned that the municipal authorities can permit the use of the surface of the street for the erection of telegraph and telephone poles and the laying of railroad tracks, the space above the surface for stringing electric wires, for the transmission of messages, and the creation of light, and may also permit the laying of water and gas pipes and sewers beneath the surface. . . . These uses are all of a public nature, and are not inconsistent with the public use to which the streets were dedicated. Under its general power to regulate the use of streets the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric wires upon poles above the surface of the streets, provided such construction and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereof."

Where the fee to a street or highway is in the abutting owner, a different rule obtains. In *Board of Trade Tel. Co. v. Barnett*, 1 N. E. 565, 107 Ill. 507, 47 Am. Rep. 453, we held that the erection of telegraph poles along a public highway in the country was inconsistent with the proper use of it, the fee remaining in the abutting property owner; but distinguished the case from those in which the fee is in the municipality. See, also, *Indianapolis & Bloomington & Western Railroad Co. v. Hartley*, 67 Ill. 439, 10 Am. Rep. 624. We have often held that, where a public street, the fee to which is in the municipality, is devoted to a new use not consistent with the public travel upon it as a street, a court of equity will not entertain a bill by abutting property holders to enjoin such new use, except in cases where the complainant alleges and proves that he has sustained special and irreparable damages different in kind and character from those sustained by other prop-

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erty owners or the public generally. This rule, with the qualification, is fully recognized in *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311, and other cases cited and relied upon by counsel for appellants, in which special and irreparable damages were shown, *Huesing v. City of Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129, also cited by counsel for appellants, does not hold a different doctrine. That case seems to have no application whatever to the one at bar.

Nor does the right of an abutting property holder to maintain a bill for injunction in such cases depend upon the question whether or not the new use of the street has been legally authorized by the municipality. In *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265, we said (page 522, 165 Ill., and page 523, 46 N. E., 36 L. R. A. 97, 56 Am. St. Rep. 265):

"The principle is that, the abutting property owner having a complete remedy at law, a court of equity will not, upon his allegation that the ordinance authorizing the construction is illegal, enjoin the defendant from proceeding until the question of illegality can be litigated and determined, but will remit to his action at law; and this, it seems to us, is a just and reasonable rule, the enforcement of which will protect the rights of all parties interested."

And in the later case of *General Electric Railway Co. v. Chicago & Western Indiana Railroad Co.*, 184 Ill. 588, 56 N. E. 963, we again said (page 594, 184 Ill., and page 965, 56 N. E.):

"The allegations of an abutting property owner that the construction and operation of a street railway in front of his property will lessen its value or injuriously affect it, or the allegation that the construction of a street railway in the street is illegal or unauthorized, will not give such abutting property owner a standing in a court of equity to enjoin the construction of such road;" citing many cases.

And again, in the case of *Chicago Tel. Co. v. Northwestern Tel. Co.*, 8 Am. Electl. Cas. *supra*, we used this language (page 347, 199 Ill., and page 335, 65 N. E.):

It is also to be observed that an obstruction in the nature of a public improvement placed in the streets of a city by the permission of the city, either express or implied, is strictly a matter between the city and the private corporation constructing the improvement, so that any action to test the right to obstruct the street should be brought by the city or by some public officer on behalf of the city;" also citing authorities.

And we also there said (page 364, 199 Ill., and page 342, 65 E.):

The fee of the streets is in the city. Cities are given exclusive control over streets and alleys within their corporate limits. It follows, as a general rule, that a court of equity will not interfere with the city's control over the use of its streets, unless the exercise of such power by the city is abused to the oppression of persons or corporations having rights in the street, or unless the action of the city in such respect is fraudulent, or grossly wrong and unjust."

The reason upon which this doctrine rests is so apparent, and has been so frequently pointed out by this and other courts, that to repeat it now is wholly unnecessary.

The first proposition cannot be sustained, and it must follow, without reference to the merits of the others, the judgment of the court below must be affirmed. Even if those objections could be sustained, the ordinance under which the appellee was proceeding would be but an illegal or irregular grant of power, which would furnish no grounds for the interposition of a court of equity at the suit of private individuals. The second, third, and fourth points made by counsel for appellants may, however, be briefly disposed of.

Conceding that the second—that is, that an ordinance purporting to grant rights to a corporation not in existence at the time of the grant is invalid—is properly presented by the bill and answer, and sustained by the facts, it is not correct as a matter of law. The ordinance, when passed by the city council, was a mere license or offer to grant a license to the company, and only became a binding contract between the city and the company when the latter accepted it. *People ex rel. v. Central Union Tel. Co.*, 8 Am. Electl. Cas. 192, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338, and cases

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there cited. The case is not different in principle from that of *Richelieu Hotel Co. v. Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1024, 33 Am. St. Rep. 234. It is said by counsel for the appellants that the appellee corporation was not thought of at the time the ordinance was adopted. It is singular that an ordinance should have been adopted granting a franchise to the appellee by its correct corporate name at a time when such a corporation was not even contemplated. The most that can be said as to the validity of the ordinance because the donee of the power was not in existence at the time would be that the proceeding by the city council was premature and irregular. But that irregularity might be waived by the parties, and could not be questioned by an abutting property holder not a party to the contract, even though he could maintain the action. *Chicago Tel. Co. v. Northwestern Tel. Co.*, *supra*.

[Matter omitted relative to procedure of city council.]

The judgment of the appellate court is right, and will be affirmed. Judgment affirmed.

GULF COAST ICE MFG. CO. v. BOWERS.

Mississippi; Supreme Court.

1. **RIGHT TO USE STREETS FOR ELECTRIC LIGHTING; ABUTTING OWNERS NOT ENTITLED TO COMPENSATION.**—A city may itself take the streets for the erection of poles and wires for furnishing light to make such streets more safe and convenient for public travel, and may authorize some other person to use the streets to furnish such light without paying abutting property owners damages for the erection in the streets of needed appliances therefor.

Appeal by defendant from refusal of court to entirely dissolve an injunction. Decided June 2, 1902; reported 80 Miss. 570, 32 So. 113.

W. J. Gex and Harper & Harper, for appellants.

McWillie & Thompson, for appellee.

Opinion by TERRAL, J.:

The municipal authorities of the city of Bay St. Louis were empowered by its charter (section 42, ch. 279, Laws 1854) to use the streets of the city for the public benefit, and on the 15th day of December, 1899, they made a contract with the appellant company for that purpose. In pursuance of this authority and contract, the appellant erected poles on and along the streets of said city and attached to them the wires and other necessary appliances for lighting the streets with electricity, and inaugurated and put in operation an electric light plant, which lighted the streets of the city in conformity with their authorization and contract. The appellant is the owner of four or more properties abutting on Front street, which is the principal street of the city, and its crowning glory, and along said street and adjacent to the lots of appellee, and without his consent, the appellant erected its poles and strung its wires, to the great disfigurement, as is said, of the view from said several properties of appellee.

The properties or lots of appellee upon Front street extend to both sides of the street, and a considerable element of their value, it is alleged, consists of an open and unobstructed view of the Mississippi Sound. Appellee, alleging in his bill of complaint the inauguration by appellant of said electric plant and the erection of its poles along the streets abutting his several properties, without his consent, and to his great injury and annoyance, sought and obtained a preliminary mandatory injunction requiring appellant within 24 hours to remove from his lots, as a nuisance, its poles, wires, and other appliances for lighting the streets. The injunction was subsequently modified so as to restore the poles, wires, and appliances removed thereunder; but from a refusal of the court to dissolve the injunction entirely the appellant brings its appeal.

The authorities are quite uniform that a city or town may use its streets as a means of making them more safe and convenient.

for public travel. The right to light the town is presumed to have been acquired and paid for, as incident to the right of public passage, when the property was condemned or dedicated for public use. In other words, the taking of the land for use as a street includes not only the right of passage, but of securing a convenient and safe passage; to light it, if you please, for that purpose. It is not a new taking of property for public use, but a completing to that extent of the uses of the first taking by adding appliances included within it, and now constructed by reason of the public need. *Keasby, Electric Wires* (2d Ed.), secs. 29, 76, 77, 82, 84; *Lewis, Em. Dom.* (2d Ed.), sec. 126; *Palmer v. Electric Co.*, 7 Am. Electl. Cas. 298, 158 N. Y. 234, 52 N. E. 1092, 43 L. R. A. 672; *In re Public Lighting* (Mass.) 24 N. E. 1084, 8 L. R. A. 487; *City of Newport v. Newport Light Co.*, 84 Ky. 166. While the lighting of the streets of a city may be a great convenience to the traveling public, especially under some conditions, the poles, wires, and other necessary appliances for so doing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public (*Theobald v. Railway Co.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564), are greatly modified by the rights of the public, which is entitled to a free passage over the street, and to the benefit of lights constructed and operated for that end. And if a town or city may light its streets, as being an object for which the street is opened, without paying the abutting property owner damages for the erection of needed appliances therefor, it must follow that the municipal authorities may authorize some other person to furnish such lights. *Keasby, Electric Wires* (2d Ed.), sec. 111; *Johnson v. Electric Co.*, 3 Am. Electl. Cas. 203, 54 Hun, 469, 7 N. Y. Supp. 716. It is said the poles and wires of appellant are unsightly, and are a disfigurement to the property, and an especial injury in that it obstructs the open view of the sea. Similar erections in all cities and towns present, though perhaps in a less degree, like inconveniences to the owners of palatial residences, but disfigurements of this kind to property are not the subjects of compensation, or, if so, they are

clusively presumed to have been paid for upon the opening of street and its dedication to public use.

It is further said that the poles used by appellant are green pine poles, with the bark peeled, and, from rapid decay, are dangerous, not lightwood poles, as required by the city ordinance; but this advance, if true, is not made a subject of controversy under the allegations of the bill of complaint herein, which are not framed to present it.

It is also complained that the electric light system of appellant is partly used for private purposes, but it appears from the record that all the poles set by appellant are necessary for executing the objects of public convenience, and in such case a mandatory injunction is not an appropriate remedy. *Johnson v. Electric Co.*, 111 Am. Electl. Cas. 203, 54 Hun, 469, 7 N. Y. Supp. 716; Keasby, *Electric Wires* (2d Ed.) sec. 30.

2. The contract of the authorities of the city of Bay St. Louis with appellant, as disclosed in this proceeding, is a valid contract, and authorized the latter to make the erections for lighting the streets of the city, and we see nothing in the mode of construction or operation of the plant that authorizes an injunction of any kind. An injunction may not be granted in this State except where right and justice demand it, and then only when the grounds for its issuance have been satisfactorily shown to the officer granting the writ. Code 1892, secs. 557, 916. Our statute makes no distinction in respect to the several kinds of writs of injunction; but in respect to mandatory injunctions, which partake of the character of judicial process, it is a sound rule that a writ of this character should not issue unless the right to it is so satisfactorily shown that there can be no reasonable doubt of its propriety. The case made should be such that there can be no probability that the defendant can make a valid objection to it. Unless the grounds for a preliminary mandatory injunction be inexpugnable, it is the safer rule to hear both sides, before directing its issuance. Pom. Eq. Jur. sec. 1359; High, Inj. sec. 2; Story, Eq. Jur. ch. 23.

The grant of the preliminary mandatory injunction in this case was error. In fact, the case presented by the bill does not warrant

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an injunction of any sort; wherefore the injunction is dissolved, and the case is remanded for further proceedings. Reversed and remanded.

POINT PLEASANT ELECT. L. & P. CO. v. BOROUGH OF BAY HEAD.

New Jersey; Court of Chancery.

1. **CONSENT OF OWNERS TO ERECTION OF WIRES.**—Electric light companies organized under the general corporation act of this State have authority to erect poles and to string and maintain wires in the public highways upon first obtaining the consent of the owners of the soil.
2. **APPLICATION OF STATUTE.**—The proviso of the act of 1896 (P. L. 1896, p. 322), declaring that no poles shall be erected in any city or town without first obtaining a designation of the street in which the same may be placed, and the manner of placing the same, does not extend to boroughs.
3. **STATUTE AUTHORIZING REMOVAL OF OBSTRUCTIONS.**—The borough act (P. L. 1897, p. 296), empowering borough councils by ordinance to regulate the streets of the borough, to remove obstructions and nuisances therefrom, and to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of the streets, confers a power which can only be exercised by the passing of an ordinance.
4. **USE OF STREETS BY ELECTRIC LIGHT COMPANY.**—Until the borough council does pass an ordinance regulating the use of the borough streets, or prescribing the manner in which electric light companies shall exercise their street privileges, an electric light company which has obtained the consent of the owners of the soil may string its wires in the public streets of the borough.
5. **OFFICERS OF BOROUGH RESTRAINED FROM INTERFERENCE.**—The borough and its officers, who claim the right to cut such wires because strung in the borough streets without the previous action of the borough council, will be restrained by preliminary injunction from such cutting. The injury to the complainant company is continuous, and threatened to be repeated, and is not one for which adequate damages can be recovered at law. (Syllabus by the court.)

Bill for injunction restraining city officers from cutting wires.
Decided July 29, 1901; reported 62 N. J. Eq. 296, 49 Atl. 1108.

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J. B. Humphreys and Peter Backes, for complainant.

David Harvey, Jr., and I. W. Carmichael, for defendants.

Opinion by GREY, V. C.:

There is very little, if any, dispute between the affidavits annexed to the bill of complaint and those appended to the answer as to the facts in this case. The argument made was almost wholly on questions of law. The complainant company claims that under the statute of April 21, 1896 (P. L. 1896, p. 322), it has received directly from the Legislature full power to use the highways of the State for the purpose of erecting poles to sustain wires, and, upon first obtaining the consent, in writing, of the owners of the soil. That statute enacts that:

"Any corporation organized . . . by virtue of the act entitled . . . 'An act concerning corporations,' for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, . . . shall have full power to use the public . . . highways . . . in this State, for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures, upon first obtaining the consent in writing of the owners of the soil. Provided, however, no posts or poles shall be erected in any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the street in which the same may be placed and the manner of placing the same," etc.

In the case of *Suburban Electric Light Co. v. Inhabitants of East Orange* (N. J. Ch.) 7 Am. Electl. Cas. 37, 41 Atl. 865, a bill was filed seeking to enjoin the township of East Orange from cutting down the light company's wires attached to poles of a telephone company in a street of that township. The above statute was cited as the authority of the light company to string its wires on the telephone company's poles. Both in this court and in the Court of Appeals the case was dealt with as involving the right of the electric light company to string wires in the public streets. An injunction was allowed. An appeal was taken, and the Court of Appeals (44 Atl. 628) sustained the decree for injunction, upon the single ground that upon the true construction of the act of 1896 the

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power conferred by it upon electric light companies "was not limited by any requirement that permission should be first obtained from a township within which the power was exercised." The opinion declares that the Legislature, when it prescribed that in "cities and towns no poles should be erected without first obtaining from the municipality a designation of streets, etc., and the manner of placing, intended to require the permission to be obtained only from cities and towns *eo nomine*," and concluded with this summation of the whole case: "The result is that the respondent (the electric light company) was possessed of sufficient authority to string and maintain the wires in question in the public streets, and whether it originally acquired or afterwards retained the permission of the township authorities was immaterial." The defendants, the borough of Bay Head and its officers, do not deny that the statute of 1896 vests in the complainant company the power to erect poles to sustain wires in the public streets, nor does it claim that a borough is, within the proviso of that act, a city or town, in which permission to erect poles shall first be obtained. Their contention is that the borough act of 1897 authorizes the council of the borough to "regulate the use" of the streets and roads of the borough, and to prescribe the manner in which corporations shall exercise any privilege granted to them in the use of any street. They insist that the pre-existing right of the complainant company to use the streets of the borough can be exercised only after the borough council has prescribed the manner in which the complainant shall exercise it. There is no claim that the wires of the complainant company, as they cross the borough streets, are obstructive of passage in the street, nor that they are in any other way a nuisance. The defendants stand upon their assertion of a right to prevent the stringing of any wires across the borough streets until the borough council shall have first prescribed the manner in which the complainant company should exercise such a privilege. The borough act of 1897, which is invoked to sustain this claim, at page 296, sec. 28, P. L. 1897, under the heading of "Powers of Council," declares:

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The council of said borough shall have power: 1. To pass, alter or repeal ordinances to take effect within the limits of said borough for the following purposes: . . . To establish . . . the boundaries of the streets and roads of said borough and to regulate the use thereof; to prevent and remove all obstructions, encroachments, intrusion and nuisances in and upon any street; to prescribe the manner in which corporation or individuals shall exercise the privilege granted to them in the use of any street."

Whether the stringing of a single wire across a public highway at such a height as not in any way to interfere with any use of the street is the exercise of a street privilege (see *City of Brigantine v. Holland Trust Co.* [N. J. Ch.], 35 Atl. 345), need not be here determined. If it is not a street privilege, the defendant borough has no control over the matter. If it is a street privilege, then the defendant borough has, by the terms of the borough act of 1897, a right to prescribe the manner in which it shall be exercised. Assuming that the act done by the complainant company in stringing its wires across the street of Bay Head was the exercise of a street privilege, must the complainant company await the previous action of the borough council before exercising it? The statute of 1896 operated as a direct grant of power to the complainant company to do the act in question. The statutory grant is so expressed that the privilege given may be completely used by the complainant company without further definition as to the manner or locality of its exercise. The statute conclusively deals with the obligation of the companies to whom the powers are given to obtain from the local authorities, before using them, a designation of place and manner of use. In incorporated cities and towns previous designation of place and manner of using is expressly required. In other places, such as townships and boroughs, there is no such requirement. In the latter municipalities the powers (given in terms which make them capable of complete exercise by the receiving corporations) may be used without first obtaining such designation from the local authorities. The court of appeals seems to have finally settled this when it declared that under the terms of the statute of 1896 an electric light company is "possessed of sufficient authority to string and maintain the wires in question in the public streets, and whether it originally obtained or afterwards

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retained the permission of the town authorities is immaterial." *Suburban Electric Co. v. Inhabitants of East Orange* (N. J. Err. & App.), 7 Am. Electl. Cas. 37, 44 Atl. 630. The borough act of 1897 does not require that the exercise of street privileges by corporations having such powers shall await the action of the borough authorities. Had the Legislature intended this, it could readily have expressed it in the statutory grant of power in the act of 1896. The Legislature then considered and dealt with the subject, prescribing certain classes of municipalities within which designations of place and manner for the use of the powers must first be obtained, and leaving them to be exercised in all other municipalities without such previous designation. A contrary purpose should not be ascribed to the Legislature by mere construction of another statute, which may have its full expressed effect without such incongruous interpretation. It must also be noted that the borough act directs that the authority there given shall be exercised by ordinance. Here is an original statutory grant of power, coupled with the prescription of a mode in which it shall be exercised. In such cases the observance of the prescribed mode is necessary to the exercise of the power. The authority given to boroughs by the act of 1897 is not self-operating to prevent the use of street privileges until action be taken. The terms used show that they are regulative of privileges already given. Until regulative action be taken in the mode prescribed by the Borough Act, any existing street privilege capable of complete exercise may be used by any party having the right to use it. In this case there is no pretense that the borough of Bay Head has at any time passed any ordinance touching the exercise of such street privileges. The borough is here, however, by answer and proofs, insisting that its officers may, by physical force, prevent the exercise of street privileges without any ordinance on the subject.

In *American Union Telegraph Co. v. Town of Harrison*, 1 Am. Electl. Cas. 291, 31 N. J. Eq. 631, the poles of a telegraph company were erected outside the lines of the street on private property. The wires overhung the street at a height of 25 feet, and were not an obstruction to the use of it. The town authorities threat-

ed to cut them down—first, because the statute under which the defendant company was organized gave it the right to use public highways for erecting poles upon first obtaining consent of owners of the soil, and a designation of streets and manner of placing the poles, and no such designation had been obtained; and, secondly, because the statute declared that the use of the streets by companies organized under it should be subject to such regulations and restrictions as might be imposed by the municipal authorities. Vice Chancellor Van Fleet held the provision as to first obtaining designation from the town authorities of streets and manner of placing poles to be inapplicable to the case before him, because the complainant's poles were in fact erected on private property, and not on the public highway; and the second justification to be of no force to prevent the stringing of wires in public streets, because the town authorities had never adopted any regulations or restrictions as to the use of the streets. He declared that when the municipality had, by appropriate proceedings, prescribed regulations, the complainants would be obliged to conform to them, but in the meantime they cannot compel the complainants to desist from further construction of their work; that the complainants had done nothing but what they had an unquestionable legal right to do; and that the defendants should be enjoined from cutting the wires, or otherwise interfering with them. In the case of *Inhabitants of Summit v. New York & N. J. Telephone Co.*, 7 Am. Electl. Cas. 58, 57 N. J. Eq. 26, 41 Atl. 146, this case was declared to be controlling upon the point whether, in the absence of a regulation by the municipality, a telegraph company has the right to string wires across a street, at a proper elevation, from poles placed outside the street. The defendants contend that the case of *Benton v. City of Elizabeth*, 61 N. J. Law, 415, 39 Atl. 683, in the Supreme Court, must be accepted as controlling the matter now under consideration, and to prescribe that the admitted pre-existing right of the electric light company to the use of the borough streets cannot be exercised until the borough council shall first have designated the place and manner of use. In that case an oil-piping company was assumed to have the power to lay pipes for the transmission of oil. The char-

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ter of the city of Elizabeth gave its council power by ordinance to prescribe the manner in which the corporation should exercise any privilege granted to them in using the city streets. The city council did pass such an ordinance. An owner adjoining the proposed pipe line took a certiorari removing the ordinance. In discussing the questions prescribed, the learned judge who delivered the opinion suggested obiter that the right of a party having a privilege to use a street is imperfect until the council indicates in what manner it may be exercised; that the pre-existing right is one to be exercised only as the council permits. The learned judge does not, in terms, declare that a legislative grant of power capable of complete exercise by the recipient of the power, which is subject to regulation by the designation of place and manner of using by local authorities, cannot be used until the latter shall first have designated. The learned judge probably referred to such legislative grants of power as, by the express terms of the statute, depend for their exercise upon the previous action of the local council. *Benton v. City of Elizabeth* was taken to the Court of Errors, and was there (in 1898) affirmed upon the opinion delivered in the Supreme Court. 61 N. J. Law, 694, 40 Atl. 1132. If that case is to be considered as an authoritative declaration of a general principle that in any municipality having power to regulate the use of streets there can be no exercise of street privileges received by direct legislative grant until the local authorities have first designated the place and manner of their exercise, then that decision certainly antagonizes that delivered by the Court of Appeals in (in 1899) *Suburban Electric Light Company v. Inhabitants of East Orange, ubi supra*, when, construing the very statute in question in this cause (the act of 1896), it declared that under that act electric light companies (outside of cities and towns) have sufficient authority to string wires in the streets, and that the permission of the town authorities is immaterial. The case of *Meyers v. Hudson Co. Electric Co.*, 63 N. J. Law, 573, 44 Atl. 713, in the Court of Errors and Appeals, is also cited as declaring that the designation of streets and manner of placing by the local authorities must first be made. That case is inapplicable to the cause *sub judice*, for the reason that the

atter there decided was the validity of ordinance of the city of
ayonne. The court declared that the permission of the city
authorities was a prerequisite to the right of the electric light com-
pany to enter the street. The statute of 1896 in terms so declares
to cities and towns. The question in the present case is whether
orough authorities, without such legislative declaration requiring
their previous action, may, under a general power to regulate
streets, and to designate the manner of using street privileges, ex-
clude the corporation having defined street privileges from using
them until such designation is made. The right of the complainant
company to string its wires in the manner stated in its bill in the
orough of Bay Head must be held to be established.

The defendants contend that the threatened injury is limited to
the cutting of but a single wire serving light to the Greenville Arms
Hotel, and that this is not such an irreparable injury as to justify
the issuing of an injunction. But this is not a fair statement of the
controversy. The pleadings and proofs show that the complainant
company had a right to string wires in the streets of the borough of
Bay Head, and was proceeding to exercise it, when the individual
defendants, in behalf of that borough, which has since adopted
their actions as its own, denying the complainant's right, cut the
complainant's wires in the streets of the borough, and destroyed
its appliances. The defendant borough asserts, by its answer, its
right to do this, and it is entirely apparent that it will do it unless
restrained by this court. The defendant's contention is not limited
to an assertion of its right and purpose to cut the Greenville Arms
Hotel wire, but to cut any wires which the complainant may string
in the streets of the borough of Bay Head. That is its claim in its
answer; that is the argument of its counsel. For such threatened
continuing and repeated injuries no adequate damages can be re-
covered at law. An order for injunction will be advised according
to the views above expressed.

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FRENCH V. ROBB.

New Jersey; Court of Errors and Appeals.

1. **EJECTMENT BY ABUTTING OWNER AGAINST PERSON OCCUPYING STREET UNDER LIGHTING FRANCHISE.**—The owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same. A person occupying part of a street with poles and appliances for lighting the street, in pursuance of a contract made with the municipal authorities under Act May 22, 1894 (P. L. p. 477), has such rightful, exclusive possession of the part so occupied as will support a plea of not guilty in an action of ejectment brought by the owner of the soil. But the right of such a person to use the street in the immediate vicinity of his poles and appliances for the purpose of maintaining them is not capable of supporting such a plea.
2. **EFFECT OF FURNISHING LIGHT TO PRIVATE PERSONS.**—If a person who has rightfully placed poles and wires in a street for the purpose of lighting the street uses them wrongfully for private lighting, he does not thereby lose his right to maintain them as against the owner of the soil.
(Syllabus by the court.)

Error by plaintiff from verdict finding defendant not guilty.
Decided March 3, 1902; reported 67 N. J. Law, 260, 51 Atl. 509.

Samuel H. Richards, for plaintiff in error.

James M. E. Hildreth, for defendant in error.

Opinion by DIXON, J.:

The plaintiff brought an action of ejectment in the Supreme Court against the Delaware & Atlantic Telegraph & Telephone Company, Joseph Q. Williams, receiver of the Franklin Electric Light Company, and Thomas Robb, executor of William P. Robb, deceased, for the possession of a plot of land five feet square within the limits of Washington and Jefferson streets, in the city of Cape May. The receiver did not plead, but the telegraph company and Robb each pleaded not guilty. At the trial in the Cape May Circuit of the issues thus raised the facts appeared as follows: The plaintiff, as owner of the land abutting upon the streets, owned also the *locus in quo*, subject to the public ease-

t. Under an ordinance and a contract between the city of e May and the Franklin Electric Light Company, dated November 30, 1897, and running to July 23, 1902, the company be bound to light the streets of the city with electricity, and to ish, erect, and maintain all necessary poles, wires, etc.; the tion and erection of the appliances in the streets being subject he approval of the city council. Accordingly a pole was placed ut the center of the *locus in quo*, and wires strung thereon. In e, 1899, the electric company had passed into the hands of a iver, and, the pole being then in poor condition, the receiver mitted the telegraph company to erect a new pole in its stead, t to string thereon a telephone wire; the pole, however, to be the erty of the electric company. Afterwards, by virtue of an er of the court of chancery, the plant of the electric company s turned over by the receiver to the defendant Robb, and when s suit was brought he was carrying out the contract with the city lighting the streets, and for that purpose he was in possession d use of the pole and some of the wires. Other wires on the pole re used by him for private lighting, and the telegraph company s using its wire for telephone purposes. On this state of facts e trial court directed a verdict for the plaintiff against the teleph company, of which no complaint is now made; and also irected a verdict in favor of Robb for so much of the land as was upied by the pole, and instructed the jury to find further in his vor for so much of the land around the pole as they should think asonably necessary to be used in maintaining and taking care of e pole. To such direction and instruction the plaintiff excepted, d, the jury having found Robb not guilty, the plaintiff seeks to verse the consequent judgment.

Before considering the special aspects of the controversy, it may helpful to advert to the real nature of an action of ejectment. riginally it was designed to recover only damages for the wrongl ejection of the plaintiff from the possession of land in which he ad a term of years. Later the recovery was extended to the pos session of the land. To succeed, the plaintiff was required to prove lease to himself for a term of years, made by a lessor entitled to

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the possession, and on the land when the lease was made, his entry under the lease, and ouster by the defendant. The action was usually instituted against a person not interested in the land, called the "casual ejector," who gave notice of the suit to the actual possessor, and he, on application to the court, was substituted as defendant. But, as a condition of such substitution, the court required him to stipulate that at the trial he would confess the lease, entry, and ouster alleged by the plaintiff, thus leaving the only fact to be proved by the plaintiff the title of his lessor. If, however, the claim of the applicant was such as would not warrant him in ousting the plaintiff, and yet would justify his own possession, as if he claimed only a joint tenant with the lessor, then he stipulated to confess ouster of the plaintiff only in case the plaintiff should prove actual ouster of the lessor. If, at the trial, the plaintiff showed such title in his lessor as made the confessed ouster wrongful; or if, when ouster was only conditionally confessed, he showed an actual ouster of the lessor, or a title against which any possession by the defendant was wrongful,—then he recovered damages and possession; otherwise his suit failed. Thus the technical issue in the case was always whether the defendant had wrongfully ousted the plaintiff. Under our statute the technical issue remains the same, although presented by a different procedure. The real claimant, the old lessor, is the plaintiff, and his complaint is that the defendant wrongfully deprives him of possession. The defendant is the real counter-claimant, and if he means to defend absolutely he pleads not guilty, and by that plea admits a possession or claim of title which should exclude or oust the plaintiff; while, if he means to defend only for a possession or claim of title which does not exclude the plaintiff,—*e. g.*, as joint tenant with him,—he must give notice with his plea that he admits the right of the plaintiff to an undivided share of the land and denies actual ouster. *Combs v. Brown*, 29 N. J. Law, 36. Then if, at the trial on the simple plea, the plaintiff shows a title against which the defendant's exclusive possession or claim would be wrongful, or, on the plea and notice, he shows an actual ouster, wrongful in view of his admitted right, or a greater right, which makes the defendant's possession a wrong

ouster, the plaintiff will be entitled to judgment; otherwise not. In the present case, the *locus in quo* being within the limits of public streets, a preliminary question arises whether the plaintiff, as owner of the soil, has such a right of possession as is capable of supporting the action of ejectment. In *President, etc., of City of Cincinnati v. White's Lessee*, 6 Pet. 431, 8 L. Ed. 452, Mr. Justice Thompson urged with much force the negative of this query; but in New Jersey the affirmative must be regarded as settled by the decision of this court reversing the judgment of the Supreme Court in *Right v. Carter*, 27 N. J. Law, 76. See *State v. Laverick*, 34 N. J. Law, 207; *Burnet v. Crane*, 56 N. J. Law, 288. The plea of the defendant Robb is simply not guilty; *i. e.*, that he has a possession of the soil which rightly excludes the owner of the soil. It is established by express decision in this State that the public corporation, which represents the public right to the use of streets, may maintain ejectment against any person, even the owner of the soil, who occupies a street in a manner inconsistent with the public use. See *Hoboken Land & Improvement Co. v. Mayor, etc., of City of Hoboken*, 36 N. J. Law, 540. From this it logically follows that the owner of the soil cannot maintain ejectment against such public corporation occupying the street within the limits of the public right. This was so adjudged by the Federal Supreme Court in *President, etc., of City of Cincinnati v. White's Lessee*, 6 Pet. 431, 8 L. Ed. 452, and *Barclay v. Howell's Lessee*, 6 Pet. 498, 8 L. Ed. 477, cases which are cited with evident approval by Mr. Justice Depue in *Hoboken Land & Improvement Co. v. Mayor, etc. of City of Hoboken, supra*. The same exemption from successful attack must be conceded to the agencies through which the public corporation exercises its rights, whether those agencies be designated by employment or by contract; for its rights would be fruitless if they could not be used to protect the individuals through whom they may be lawfully exercised, and without whose intervention the corporation could not enjoy them. One of the rights belonging to the corporation is to occupy the streets with poles and wires for public lighting. This right was expressly conferred by Act May 22, 1894

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(P. L. 1894, p. 477), according to which it may be exercised either directly by the city itself or indirectly through parties contracting with the city, and is not conditioned upon consent of the owner of the soil. *Meyers v. Electric Co.*, 63 N. J. Law, 573, 44 Atl. 713. When the contract under which Robb claims was made, this statute was in complete force; and, although "An act concerning townships," approved March 24, 1899 (P. L. 1899, pp. 372, 476), attempts to repeal it, yet, as the title of this act limits its operation to townships, the statute still remains effective in cities. So far, therefore, as Robb occupied the streets with poles and other appliances for public lighting, and thereby excluded the plaintiff, the ouster was not tortious, and a verdict of not guilty was properly directed.

But the defendant pleaded not guilty for the entire *locus in quo*, and we must consider whether, outside of the space occupied by these appliances for public lighting, he has shown a right to the exclusive possession which his plea sets up. No color of right is shown for maintaining apparatus for public lighting, and as to the wire strung for that purpose the defendant was clearly guilty. The plaintiff urges that the wrongful use of the pole to sustain this wire should be visited with the forfeiture of the entire right; but we find no ground for such contention. Such a judgment would inflict a loss upon the public for the private fault of one of its instruments. The plaintiff does not need such rigor for his protection. So far as the appliances are not used for public purposes, this suit will result in abating them; so far as those required for public purposes have been wrongfully used, the plaintiff can be compensated by an action on the case for damages, and equity will restrain their misuse in the future.

There remains for consideration the defendant's claim to the land around the pole and appliances, found by the jury to be necessary for his use in maintaining them. The right to use that land for such a purpose did not justify the exclusive possession admitted by the plea. It was only the right enjoyed by every member of the community while in actual use of the street. It was discontinuous, and lacked the permanent and exclusive characteristics which are

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ecessary to support or defend an action of ejectment. As a personal right, it was, in essence, like a private right of way, which does not constitute a defense in an action of ejectment brought by the owner of the soil. *Burnet v. Crane*, 56 N. J. Law, 285, 28 Atl. Rep., 44 Am. St. Rep. 395. The proper conduct of the trial at the suit required a verdict that the defendant Robb was not guilty of that part of the *locus in quo* which was actually occupied by the pole and other appliances used for public lighting, and that as to the residue he was guilty. The present judgment should be reversed, and a *venire de novo* awarded.

CALLEN V. COLUMBUS EDISON ELECTRIC L. CO.

Ohio; Supreme Court.

TITLE OF CITY IN STREETS.—The title which a municipal corporation acquires, under section 2801, Rev. Stat., to streets dedicated by a proprietor who subdivides lots for sale, is held for the use of the public for street purposes.

COMPENSATION TO ABUTTING OWNERS.—An owner of a lot abutting on such street has a property interest in the street in front of his lot, which cannot be taken against his will, except upon the terms provided by the constitution, viz., that a compensation shall first be made in money, or by a deposit of money. *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Cincinnati & S. P. Ave. St. Ry. Co. v. Village of Cumminsville*, 14 Ohio St. 523; and *Railway Co. v. Laurence*, 38 Ohio St. 41, 43 Am. Rep. 419, approved and followed.

USE BY PRIVATE LIGHTING COMPANY IS A DIVERSION.—The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner, within the meaning of section 19 of the bill of rights. And such placing of poles, lines, and wires is none the less an authorized taking, even though it be consented to by the city authorities.

INJUNCTION RESTRAINING USE.—And where it appears that the acts of the lighting company in so placing its poles, lines, and wires were done without the knowledge or consent of the lot owner, and that their main-

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tenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance, and an order for removal.

(Syllabus by the court.)

Error by plaintiff from judgment for defendant. Decided April 22, 1902; reported 66 Ohio St. 166, 64 N. E. 141.

G. J. Marriott, for plaintiff in error.

Paul Jones, for defendant in error.

Opinion by SPEAR, J.:

The determination of the rights of the parties in this case involves an inquiry respecting the interest which the owner of land abutting on the streets of a municipality has in those streets. As to country highways, it seems to be settled in this State that, while the public has the right of improvement and uninterrupted travel, the abutting owner has the right to all uses of the land not inconsistent with this right of travel and improvement. The subject is considered anew, as to such highways, in the case of *Schaaf v. Railway Co.*, 66 Ohio St. 215, 64 N. E. 145, reported contemporaneously with this case, where it is held, in substance, that an interurban railroad on the side of a country highway, to be constructed and operated in the manner therein described, is an additional burden, and an interference with the right of the owner of abutting lands, and that such owner is entitled to an injunction to prevent the construction until such right has been legally appropriated; and it is unnecessary to do more here than to refer to that case. It is, however, insisted that even if it be conceded that, as to country highways, the abutter is the owner of the fee to the middle of the road, and therefore has peculiar rights therein, yet rules applicable to such a situation will not apply to the case of city streets, where, under the statute, the fee is in the city. No special finding appears in the record as to the dedication of Bryden road and Irvine street, but it is presumed that Parsons' addition was platted and recorded in accordance with the statute. The statutory provision respecting

the effect of such dedication is found in section 2601, Rev. St., and a substantial reproduction of the provision of section 6 of the act of March 3, 1831 (Swan & C. St. p. 1483). It is as follows: "And thereupon the map or plat so recorded shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended." It seems plain that the effect of the provision is not to vest in the municipality a fee simple absolute in the streets, but only a determinable or qualified fee, and that what is granted to the city is to be held in trust for the uses intended, viz., for street uses, and street uses only. Such title would be adequate to clothe the municipality with power to fully perform its statutory duty toward such streets, viz., to keep the same open, in repair, and free from nuisance, and for all incidental street purposes. The limitation upon the title necessarily implies that there is a substantial interest not conveyed. Naturally it would be presumed that the right of reverter would remain either in the original proprietor, or would pass to and vest in the owners of the abutting lots. That, as between these two classes, the interest is in the owner of the abutting lots, was held by this court in *Stephens v. Taylor*, 51 Ohio St. 593, where a street had been vacated by the city, and the question presented was whether the fee reverted to the heirs of the original owner who dedicated the street, or to the owners at the time of the vacation of the lands abutting. No report of the case was made by this court, but it will be found fully reported by the Circuit Court, opinion by Shearer, J., in *Stevens v. Shannon*, 6 Ohio Cir. Ct. R. 142. The same principle is announced in *Manufacturing Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341. That this interest is a private right of the nature of an incorporeal hereditament, legally attached to the contiguous grounds and the erections thereon, has been so frequently held by this court that extended repetition would not be a justifiable use of space. It suffices to refer to *Crawford v. Village of Delaware*, 7 Ohio St. 459, 469; *Cincinnati & S. P. Ave. St. Ry. Co. v. Village*

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of *Cummingsville*, 14 Ohio St. 523; *Railway Co. v. Lawrence*, 38 Ohio St. 41, 43 Am. Rep. 419. It would seem to follow from the foregoing that, for practical purposes, there is no substantial difference in the right of the owner of lands abutting upon a country highway in such highway, and that of the owner of a lot abutting on a city street in such street. In the one case, where the fee is in the landowner, his rights in and over the streets are in their nature legal, while, if the fee be in the public, the lawful rights of the abutting owners are in their nature equitable easements. In both situations the right of the public is for road or street purposes, and is necessarily limited to such control as is necessary to accomplish those purposes. As to country highways, that object is accomplished ordinarily by securing free passage for travel and reasonable maintenance and repair, while as to city streets the necessary uses and consequent control is the same, viz., for street purposes. The question has been a subject of much contention and of contrary decisions, but the conclusion above stated is, we think, supported by the better reason, as it is by abundant authority. See Dill. Mun. Corp. secs. 656a, 656b, 664a; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. 528, and authorities there cited; also *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; and *Railway Co. v. Lawrence*, *supra*.

It would be idle now to discuss at length the character of this right of the owner of abutting land in the street. By repeated adjudications it is declared to be a right which attaches to his property, and as expressed by Swan, J., in the *Village of Delaware case*, *supra*, and quoted by Ranney, J., in the *Village of Cumminsville case*, *supra*, and by White, J., in the *Lawrence case*, *supra*, is "as much property as the lot itself." And if, as held by these adjudications, the owner's right in the street is to be treated as property, the only remaining question is whether or not the acts of the defendant complained of constitute, in an essential degree, a taking of that property, within the meaning of the Constitution. And here we inquire, what is meant by the word "property?" If, as was once understood, and is still understood by some, it means only

corporeal thing, as a horse or a piece of land, then a negative answer to the question would seem to follow. If, however, the true meaning is the right of property in, and dominion over, the specific thing, then we would seem to be led to a different answer. That the latter meaning is the true one appears now to be the settled doctrine. Under this definition the word "property" is held to denote certain rights in things which pertain to persons, and which are created and sanctioned by law. They are, as stated by one writer:

"The right of user, the right of exclusion, and the right of disposition. . . . A person's right of property in things, therefore, consists of the right to possess, use, and dispose thereof in such manner as is not inconsistent with law." Lewis, Em. Dom. sec. 54, and authorities cited.

As put by Shaw, C. J., in *Old Colony & F. R. R. Co. v. Inhabitants of Plymouth Co.*, 14 Gray, 161:

"The word 'property,' in the tenth section of the bill of rights, which provides that, whenever the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor, should have such a liberal construction as to include every valuable interest which can be enjoyed as property, and recognized as such."

And that this is the meaning intended by the previous adjudications of this court which have been cited, we think there can be no reasonable doubt.

Coming now to the question of taking, it is to be admitted that it has been held necessary to the idea of a taking that there must be an exclusive appropriation; a physical, tangible appropriation of the property of another; a taking the property altogether. This is the doctrine announced in *Hurt v. City of Atlanta*, 100 Ga. 274, 28 S. E. 65, and some other cases. But the rule more frequently held, and we think the more enlightened rule, is that this limitation of the term "taking" to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property; for, if the right of user is an essential element of ownership, then whatever physical interference

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annuls this right takes property. See *Lewis, Em. Dom. sec. 58*; *Pearsall v. Supervisors*, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; *Booming Co. v. Jarvis*, 30 Mich. 308; *Eaton v. Railroad*, 51 N. H. 504, 12 Am. Rep. 147; *Thompson v. Improvement Co.*, 54 N. H. 545; *Arimond v. Canal Co.*, 31 Wis. 316. The doctrine is not better stated than by the Supreme Court of the United States (opinion by Mr. Justice Miller) in *Pumpelly v. Canal Co.*, 13 Wall. 166, 20 L. Ed. 557, in discussing the law of eminent domain:

"The constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such a serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

And when we hold, as we do, that the property interest which is here defined is protected by the Constitution (article 1, section 19), which provides that private property shall ever be held inviolate, and when taken for public use, except in time of war or other public exigency, compensation therefor shall first be made in money, or first secured by a deposit of money, as well as by section 5 of article 13, which provides that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money," etc., we but follow the law as laid down by our predecessors in the cases cited, and followed in many adjudications in more recent years. And if the owner's right in the street be property, as hereinbefore defined, and as such is protected by the Constitution, it inevitably follows that the attempt by a private corporation, in order to accomplish its own private business purposes, to invade that right by placing in the street in front of the lot permanent erections, which will in any appreciable degree impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking. It is a diversion of the

of the street from the purposes originally designed for it, and it can be taken at all, as against the will of the owner, it must be upon the terms prescribed by the Constitution. To the Ohio decisions already cited may be added as bearing generally on the subject: *Cincinnati Inclined Plane Ry. Co. v. Telegraph Ass'n*, 3 Am. Electl. Cas. 443, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 9 Am. St. Rep. 559; *Railway Co. v. Campbell*, 51 Ohio St. 328, 7 N. E. 266; *Daily v. State*, 5 Am. Electl. Cas. 186, 51 Ohio St. 48, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Kramer v. Railway Co.*, 53 Ohio St. 436; also *Craig v. Railroad Co.*, 39 N. Y. 404; Dill. Mun. Corp. sec. 698a; *Backus v. City of Detroit*, 9 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447; *Pierce*, R. R. 241; *Broome v. Telegraph Co.*, 2 Am. Electl. Cas. 259, 42 N. J. Eq. 41, 7 Atl. 851; *Palmer v. Electric Co.*, 7 Am. Electl. Cas. 298, 58 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, *Carpenter v. Electric Co.*, 7 Am. Electl. Cas. 312, 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286; *Light Co. v. Hart*, 1 Pa. Dist. R. 571; *Tiffany v. Illuminating Co.*, 1 Am. Electl. Cas. 629, 51 N. Y. Super. Ct. 280; *Crowsw. Electricity*, sec. 126; and *Lewis*, Em. Dom. sec. 131.

Nor can it avail defendant that the city of Columbus has given consent to its use of these streets,—and we do not undertake to determine here whether such consent has or not been legally given; for the city has and can have no power to legalize or sanction such taking. The electric lighting by defendant is not of the streets and for the city. It is wholly for private use. Hence it is a private purpose, and is not a street purpose in any aspect of it. Its use of these streets is not such as was contemplated by the original dedication. On the contrary, the maintenance of its structures devolves new burdens upon the land,—burdens calculated to materially impair the rights of the owner in the street. The plaintiff's evidence tends to show that the impairment of the value of plaintiff's lot would be serious, and no evidence was offered by defendant to the contrary. If the company has the right to plant two poles, with nine electric lines or wires, it has by the same authority the right to plant twenty poles with ninety wires. It is a question of right, and right only. We are not required to determine whether the im-

pairment will be much or little. If it is appreciable in character and amount, the plaintiff is entitled to relief.

Nor is the defendant's contention aided by its contract with the city for the placing of the fire-alarm box upon its iron pole. The finding shows that such pole is not necessary for the city's use, and that a post much less objectionable in character, or a pole maintained at a point where it would be likely to cause less obstruction to access, would serve the city just as well. It is to be borne in mind that the city's control of the streets is confined to street purposes, and is not for general municipal purposes. The distinction is obvious. The primary object of highways is for public travel. As expressed by Dickman, J., in *Cincinnati Inclined Plane Ry. Co. v. Telegraph Ass'n*, *supra*, "the primary and dominant purpose of their establishment was to facilitate travel and transportation." Whatever is a necessary incident to that use, the city may provide. Sewers, for instance, drain the surface water, and thus relieve the streets from impairment and destruction, and in this respect sewers are for a street purpose, while in addition they may drain abutting property, thus tending to promote the public health, and in this respect they serve a municipal purpose. The same may be said as to water supply for cleansing and sprinkling the streets, and by owners of property abutting for cleaning and domestic uses, and for the extinguishment of fires. Light, also, is necessary for street purposes, and is convenient for the use of citizens, thus serving two uses,—one a street purpose, and the other a municipal purpose. But a fire-alarm apparatus is strictly a municipal convenience. It does not enter necessarily into the control of streets. So it would seem that the city's right to maintain a pole for fire-alarm purposes may not be entirely clear, although we are not called upon in this case to pass upon that question, and do not undertake to do so.

The right of the abutting owner to the unimpaired use of the street, and to be compensated for new and additional burdens imposed by diversion of the street to new uses, is recognized and enforced by a number of sections of our Revised Statutes, which, without quoting their provisions, are here cited for reference, *viz.*

tions 3456, 3457, and 6448. They are cited only as showing a relative purpose to conserve the rights of abutting owners.

From the foregoing it results that the conclusion of law found by the Circuit Court is an erroneous one; that the holding of the common Pleas is, under the admitted facts, the true rule; and that the plaintiff is entitled to the remedy accorded by the latter court. Judgment for plaintiff will therefore be entered here, perpetually enjoining the maintenance of the poles and wires complained of, and a mandatory injunction ordered, requiring their removal. Judgment accordingly.

WILLIAMS, C. J., and BURKET, DAVIS, and PRICE, JJ., concur.

Rights of abutting owners to compensation for use of streets by electric light companies.—The weight of authority is in favor of the proposition that the maintenance of poles and wires of an electric light system for the purpose of lighting the streets of a city is a public use, and not inconsistent with the terms of the trust under which the municipality holds the fee in the streets. The erection and maintenance of such poles and wires is not, therefore, an additional servitude upon the street, and an abutting owner is not entitled to compensation. *Tuttle v. Brush Elect. Ill. Co.*, 1 Am. Electl. Cas. 508, 50 N. Y. Super. Ct. 464; *People ex rel. McManus v. Thompson*, 1 Am. Electl. Cas. 554, 65 How. Pr. (N. Y.) 407; *Johnson v. Thomson-Houston Elect. Co.*, 3 Am. Electl. Cas. 203, 54 Hun (N. Y.), 469, 7 N. Y. Supp. 716; *Elect. Construction Co. v. Heffernan*, 3 Am. Electl. Cas. 207, 58 Hun (N. Y.), 5, 12 N. Y. Supp. 336; *Consumers' Gas & Elect. L. Co. v. Congress Spring Co.*, 3 Am. Electl. Cas. 211, 61 Hun (N. Y.), 133, 15 N. Y. Supp. 624; *Loeber Butt Cen. Elect. Co.*, 5 Am. Electl. Cas. 130, 16 Mont. 1, 39 Pac. 912; *Olmer v. Larchmont Elect. Co.*, 7 Am. Electl. Cas. 298, 158 N. Y. 231, 52 N. Y. 1992. *Contra, McLean v. Brush Elect. L. Co.*, 1 Am. Electl. Cas. 483, 9 Cin. Law Bull. 65; *Haverford Elec. L. Co. v. Hart*, 4 Am. Electl. Cas. 148, 13 Pa. D. Ct. R. 369.

But if the electric light company has no contract with the municipality for the lighting of its streets and only uses the streets for the purpose of furnishing light to private individuals, an additional burden is imposed upon the streets by the occupancy thereof with poles and wires, and the abutting owners are entitled to compensation, and may maintain actions in equity to compel the removal of the poles and wires. *Carpenter v. Capital Elect. Co.*, 1 Am. Electl. Cas. 312, 178 Ill. 29, 52 N. E. 973; *Andreas v. Gas & Elec. Co.*, 1 Am. Electl. Cas. 319, 61 N. J. Eq. 69, 47 Atl. 555; *Tuttle v. Brush Elect. Ill. Co.*, 1 Am. Electl. Cas. 508, 50 N. Y. Super. Ct. 464.

The Legislature has no power to grant permission to erect electric light poles so as to substantially impair the easement of an abutting owner in light, air and access to and from the street, without providing for compensation. *Wyfany v. U. S. Ill. Co.*, 1 Am. Electl. Cas. 629, 67 How. Pr. (N. Y.) 73,

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CONDEMNATION OF RAILROAD RIGHT OF WAY.

CLEVELAND, C. C. & ST. L. RY. CO. V. OHIO POSTAL TELEGRAPH CABLE CO. ET AL.

Ohio; Supreme Court.

1. CONDEMNATION OF RAILROAD RIGHT OF WAY BY TELEGRAPH COMPANY.—In a proceeding instituted in the probate court by a magnetic telegraph company, under the provisions of sections 3456 to 3459, inclusive, Rev. St. 1892, for the purpose of appropriating to its use a part of the right of way of a railroad company organized under the laws of Ohio, it is necessary and jurisdictional for that court to hear and determine, and so enter of record, that the easement sought to be appropriated by such telegraph company will not in any material degree interfere with the practical uses to which the railroad company is authorized to put such right of way. The burden of proof to establish that fact is upon the telegraph company, and, until the court has so determined, it is without jurisdiction to order an appropriation, and impanel a jury for the assessment of compensation to the railroad company.
2. MEASURE OF COMPENSATION.—When the necessary preliminary facts are found as prescribed by the statute, and the case proceeds to an inquiry as to the compensation due the railroad company, the measure of compensation is the amount of decrease in the value of the use of the right of way for railroad purposes which will result from the easement appropriated and used by the telegraph company.
(Syllabus by the court.)

Error by defendant from judgment for plaintiff. Reported 67 Ohio St. 306, 67 N. E. 890; decided May 19, 1903.

Statement of facts:

On August 30, 1899, the defendant in error, the Ohio Postal Telegraph Cable Company, filed in the Probate Court of Crawford county its petition against the plaintiff in error and the holders of certain trust deeds, securing certain bonded indebtedness owing by the railway company, the purpose and prayer of which petition were to obtain by appropriation the right of the Ohio Postal Telegraph Cable Company to enter upon and occupy, for the erection and operation of its telegraph line, five feet of the right of way of the plaintiff in error, from the city of Cleveland, Ohio, to the State line at Union City; the five feet to be of the outer and southerly part of said right of way. The right to make the appropriation is asserted under the provisions

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of sections 3456 to 3459, inclusive, Rev. St. 1892. The plaintiff in that proceeding in the Probate Court alleged its corporate capacity under the laws of Ohio, and that the railway company owns a right of way for railroad purposes, about 100 feet in width from Cleveland to Union City, and that the petitioner needed a line of telegraphic communication between these cities and beyond, and that the most direct, safe and practicable route for the construction of its line is on and along the right of way of said railway company, and that the board of directors of the Telegraph Cable Company had duly adopted a resolution declaring it to be necessary to appropriate the right to use five feet of the southerly side of the right of way, and that it had been unable to agree with the railway company as to the compensation to be paid. The petition further details the character of poles to be erected, the wires to be strung, and other fixtures which the Telegraph Cable Company would place on the strip so to be appropriated; also "that the erection of the line of telegraph upon the right of way will not in any material degree interfere with the practical or usual and ordinary uses to which said railway company is authorized to put such right of way." The petition was afterwards amended to claim the right of appropriation from a point one-half mile west of Berea Station, in Cuyahoga county, on the southerly side of the right of way, to Shelby Station, in Richland county, thence across the right of way to the northerly side thereof, and to continue on the northerly five feet of the right of way to Union City, on the State line. After service had been duly made, the Railway Company filed an answer, upon which the preliminary hearing was had in the Probate Court. The answer is a general denial of each and every allegation in the petition and the amendments made thereto.

It is stated in briefs of counsel that on the hearing the Ohio Postal Telegraph Cable Company introduced as part of its evidence the charter issued to it by the State of Ohio, the organization of the company thereunder, election of officers, and certain proceedings of its board of directors declaring the necessity for appropriating the portion of the right of way, and that thereupon the railway company sought to defeat the right of the Telegraph Cable Company to institute the proceedings by showing that there had been no payments made upon any of its capital stock, without which it could transact no business. This latter point seems to have failed, no doubt because it is immaterial; and, after hearing the evidence offered, the Probate Court made the following findings and order: "Tuesday, January 16, 1900. This cause having been continued from the ——— day of November, A. D. 1899, being the day theretofore fixed by the court for the hearing of this cause, until the 27th day of November, A. D. 1899, upon said last-named date came the plaintiff by its attorneys, and also the defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by its attorneys, and this cause came on for hearing upon the petition of the plaintiff filed herein, and the answer of said defendant railway company, all of the defendants having been duly and legally served with process or by publication herein, and upon the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owners of the property, and the necessity for the

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appropriation, and the same was heard upon the evidence offered by the parties, and was argued by counsel, and the court, not being fully advised in the premises, took the same under advisement; and now, on this 16th day of January, A. D. 1900, the court, being fully advised in the premises, do find that the plaintiff is a corporation, and has a legal right to make the appropriation of the property described in the petition, as prayed for; that the plaintiff is unable to agree with the owners of the property as to the amount of compensation to be paid therefor; and that there is a necessity for such appropriation as prayed for in the petition; and the court, proceeding as directed by statute, orders and directs that a jury be drawn as required by law, returnable at a time to be hereafter fixed by the court. To all of which findings of the court the defendants at the time excepted. CHARLES KINNINGER, Probate Judge." The railway company filed a motion for a new trial March 3, 1900. This motion was overruled on March 22, 1900, and a bill of exceptions as to the proceedings on preliminary hearing was allowed for the Railway Company April 23, 1900. After making the findings and order of January 16, 1900, the Probate Court ordered a jury to assess to the railway company compensation on account of the appropriation. A jury was drawn and impaneled, and the case heard. A verdict of \$6,750 was returned by the jury and confirmed by the court. The motion for new trial filed by the Telegraph Cable Company was overruled. One of the grounds of the motion was that the verdict was excessive. Error was prosecuted in the Court of Common Pleas by the Postal Telegraph Cable Company to reverse the Probate Court and obtain a new trial. The Court of Common Pleas found error and reversed the judgment of the Probate Court, and set aside said verdict, but retained the case for trial in the Court of Common Pleas as to the question of compensation. Trial was had to a jury in that court, and a verdict for \$500 compensation returned March 26, 1901, which verdict was confirmed on March 30, 1901. During the trial, exceptions were taken to the exclusion of evidence offered by the Railway Company, and also exceptions to the charge of the court, and for refusing to charge as requested. Error is prosecuted in this court by the Railway Company to reverse the judgments of the lower courts.

E. A. Foote, John T. Dye and H. D. Estabrook, for plaintiff in error.

Henry & Robert Newbegin and Frank L. Loesch, for defendants in error.

Opinion by PRICE, J.:

The controversy between the parties to this case opened in the Probate Court of Crawford county in August, 1899, and it has been carried on with unremitting vigor through that and the inter-

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ing courts, and its various phases have been elaborately presented to this court in briefs. Some of the arguments and a large amount of statistical and historical matter found in the almost unlimited brief for plaintiff in error are wholly superfluous, and we are asked to pass upon numerous questions which counsel discuss therein, many of which are no longer material, and tend only to obscure, if not to lose sight of, the necessary vital points found in the record. Sifting the wheat from the chaff of the case, the substance of our labor may be divided into two branches: (1) The proceedings had on the petition of the Ohio Postal Telegraph Cable company against the railway company in the Probate Court for the purpose of appropriation to its use of part of its right of way, and which is called the "preliminary hearing;" (2) the questions arising on the trial before the jury for the assessment of compensation to the railway company.

1. It is forcibly pressed upon our attention by counsel for defendant in error that, by reason of the neglect of plaintiff in error, the proceedings at the preliminary hearing are not before us, because its motion for a new trial was not filed within the statutory time in such cases, and that the bill of exceptions purporting to contain the preliminary proceedings was not prepared and allowed within the time prescribed by statute. And we are cited to the record of the Court of Common Pleas, where we find that, for the above reasons, that court struck from the files the bill of exceptions and dismissed the petition in error filed therewith by the railway company. And we further find that the Circuit Court affirmed the Court of Common Pleas in so doing. This is complained of in this court as erroneous, in case No. 7,778, between the same parties, and which is a close companion of this case, and, as such, will be decided presently. 57 N. E. —. However, we do not regard that controversy as very important now, and we may and do ignore the bill of exceptions, as being properly stricken from the case; and yet we have remaining in the record the vital question as to the jurisdiction acquired by the Probate Court, and this is exhibited in the certified transcript of that court, which was a necessary part of the record in each of the reviewing

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courts, and also of the record in this court. This is properly so, in order that we may have a continuous chain of the controversy from its inception in August, 1899, down to the last verdict and judgment of the trial court in March, 1901.

An issue was made up between the defendant in error and the railway company, when the latter denied each and every allegation of the petition asking the appropriation. The petition was more than the ordinary petition to appropriate the property of another, and it was so necessarily, because the statute under which the petitioner was proceeding required averments of fact not usual or required in other cases of appropriation. After fully describing what ground it desired to use, and what it expected to place and erect on the premises desired, and other facts to give the court jurisdiction to hear the case, it is alleged: "Plaintiff says that the erection of said telegraph line upon said right of way of said railway company will not in any material degree interfere with the practical or usual and ordinary uses to which said railway company is authorized to put such right of way, but that if this honorable court, nevertheless, shall be satisfied that the construction of said line in any place will interfere in any material degree with such use of the right of way by the defendant railway company, this plaintiff hereby offers and stands ready at all times to construct and erect the line at such other places and in such manner as this honorable court shall direct and require."

This language, as a part of the petition, would naturally occur to the pleader on the reading of the statute under which the telegraph cable company was proceeding. The act authorizing the steps taken by defendant in error was passed March 31, 1865 (62 Ohio Laws, p. 72), and, so far as we know judicially, has had a silent and harmless existence until it was invoked in this case. By section 3456, Rev. St. 1892, a magnetic telegraph company may enter upon any land, whether owned by an individual or corporation, for the purpose of a preliminary survey and examination, with a view to locating and erecting its lines, and that it "may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers,

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ments, wires and other necessary fixtures, and for stations, the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines." The next section (7) limits the right of occupation by the telegraph company, and that it may not interfere with buildings and inclosures belonging to the landowner. It is provided in section 3458: "When land is sought to be appropriated for lines of magnetic telegraph, whether held by a corporation incorporated under any law of this State, whether held by purchase, or in virtue of any appropriation authorized by its charter or by any law of this State, the right of such company to appropriate such lands shall be limited to such extent as shall not in any material degree interfere with the practical uses to which the company is authorized to put such lands under its charter. . . ."

Because of this express limitation on the right to appropriate lands of an Ohio corporation, it was incumbent upon the telegraph cable company to plead in its petition a proposed condition which would be within the statutory limitation, and it so pleads, and we have quoted from that petition. Therefore, when the railway company denied, as it did, each and every allegation in the petition, the averment quoted was put in issue, and the burden of proof was upon the petitioner to satisfy the Probate Court of the truth of that, as well as other jurisdictional averments. It is not difficult to see how important the inquiry would be on this subject of probable conflicting uses. In this case the property to be used for the right of way of a railroad company holding an Ohio charter, the petition avers, and it devolved upon the petitioner to satisfy the Probate Court that the use and occupancy it desired would not "in any material degree interfere with the practical uses to which the company is authorized to put such lands under its charter." This recognizes the well-settled rule that property devoted to one use cannot be subjected to another use unless it be consistent with the first. The briefs of counsel are silent on this subject, and we cannot find in them any statement tending to show whether or not any evidence was introduced on the preliminary

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hearing touching this question; and, unless we look into the forbidden bill of exceptions, we cannot know with absolute certainty. But we have a right to assume that no such testimony was offered or received, because the record of the Probate Court is entirely silent and contains no finding upon the subject, and in this we think that record is fatally defective.

Section 3459, Rev. St. 1892, provides that "the right of such company to use lands held by a railroad company, for the permanent structures of said telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts, showing that it is impracticable to erect such line within said limits. . . . The Probate Court shall in all instances determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated, will in any material degree, interfere with the practical uses to which such railroad company is authorized to put such lands, and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places, as the court shall direct. . . ."

In the case at bar the telegraph company desired to appropriate to its use the outer five feet of the right of way of the railroad company, and it alleged that such use would not interfere in any material degree with the practical uses of the right of way by the railroad company. This was controverted by the latter company by answer in the Probate Court. On the controversy, the above statutes make it the duty of that court to determine, as a jurisdictional fact, whether or not the desired use and occupancy will interfere in any material degree with the practical uses the railroad company has a right to make of its right of way. The court had no discretion on the subject, because the statute is mandatory. It is a wise provision, and is intended to ascertain, to some extent, at least, in advance of calling of a jury to assess compensation, whether the desired use will be compatible with the rights of the

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road company. How does the record stand on this point? As
 n from the entry copied in the statement of this case, the
 Probate Court made no finding on the issue joined as to the con-
 ting use. The findings are such only as are made in the ordi-
 y case for the appropriation of property, as follows: "Now,
 this 16th day of January, A. D. 1900, the court, being fully
 ised in the premises, do find that the plaintiff is a corporation,
 d has a legal right to make the appropriation of the property
 cribed in the petition as prayed for; that the plaintiff is unable
 agree with the owners of the property as to the amount of com-
 nsation to be paid therefor; and that there is a necessity for
 h appropriation, as prayed for in the petition; and the court,
 ceeding as directed by statute, orders and directs that a jury
 drawn," etc. These findings are such as are contemplated by
 tion 6420, Rev. St. 1892, which is a part of the general act for
 appropriation of property. But the telegraph company, in order
 avail itself of that act, to enter upon and appropriate the use
 a part of a right of way from another corporation, must bring
 elf within the provisions of the law which authorize such a pro-
 eding, and plead and prove the additional jurisdictional fact
 on which the court can authorize the appropriation. The facts
 re pleaded, but no hearing was had upon them, as we assume,
 r the court did not pass upon them. We regard the finding re-
 ired in section 3459, *supra*, as essentially jurisdictional, and
 at it would be the chief stone in the foundation upon which the
 egraph company must base its right to institute and conduct the
 quiry as to compensation to the owner; and where this chief
 one, prescribed by statute to be laid at the preliminary hearing
 absent, the superstructure will not withstand attack, especially
 hen made in a direct proceeding. Adopting the above course
 f reasoning, we are of opinion that the Probate Court did not
 obtain jurisdiction to order the appropriation and make the order
 f an inquiry of compensation before a jury. If the petitioner
 ade no proof under section 3458, Rev. St. 1892, the petition
 ould have been rejected.

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2. What we have said under the first branch of the case might well terminate our labor; but, as the reversal will take the case back to the Probate Court for a new preliminary hearing on the petition and answer, it is best to dispose of the grave contention concerning the true measure of damages to be adopted for the guidance of the jury, if the case should reach that stage, and require, as it would, an inquiry and assessment of compensation. The record of the trial on this subject in the lower court discloses many vain efforts on the part of the railroad company to introduce some evidence of the threatened invasion of its rights, and its injurious consequences. It succeeded in qualifying some of its witnesses to give testimony as to the value of its right of way with and without the incumbrance of the telegraph company, but they were not allowed to state what the difference in value would be. Various other forms of inquiry were resorted to in order to reach the measure of compensation, but none were satisfactory to the court, and in the end there was no evidence admitted upon which the jury could pass. Therefore the verdict of the jury was rendered practically without any evidence, except it be the charge of the court. Some of the evidence offered was properly excluded, but, in all the rulings of the court upon the constant controversies over the introduction of testimony, the court was content with sustaining objections, and at no time did it undertake to lay down any rule by which counsel might be guided. And after the close of all vain efforts, the court, after reading the petition and answer, gave the following and only charge: "The court charges you that the damages sustained by the railroad company by such use of said 5-foot strip by the plaintiff, the telegraph company, can only be nominal damages. Nominal damages in this case may be anywhere from \$100 to \$500. Your verdict will be for the defendant for such damages as you find it has sustained, within the above limits." The jury took the suggestion of the court and returned a verdict for \$500. In our judgment the instruction is not the law of the case, nor is it even a faithful remembrance of the meaning of "nominal damages." It is said that the trial court obtained the above standard of compensation from the fol-

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wing and similar cases cited in brief of defendant in error: *Mobile & Ohio R. Co. v. Postal Tel. Cable Co.* (Tenn.), 46 S. W. 1, 41 L. R. A. 408; case between same parties, before Supreme Court of Alabama, 24 South. 408; *Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co.* (C. C.), 104 Fed. 623; case between same parties (C. C. A.), 111 Fed. 842; *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah), 7 Am. Electl. Cas. 417, 65 Pac. 735; *St. L. & C. R. Co. v. Postal Tel. Co.*, 7 Am. Electl. Cas. 423n, 173 Ill. 508, 51 N. E. 382; *C., B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. We have examined those cases, and the facts upon which they stand, and the rule held in most of them is entirely different from the instruction given by the trial court in this case. True, in two of the cases the judges deciding them use the term "nominal damages" as the standard of recovery, but it was a conclusion from the facts of the case in hand, and not as a rule of law to govern in other cases. The two cases referred to are *Mobile & Ohio R. Co. v. Postal Tel. Cable Co.* (Tenn.), 46 S. W. 571, 41 L. R. A. 403; same parties, 24 South. 408. But they quote and approve the rule adopted in the other cases, which we will briefly notice. In *Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co.* (C. C.), 104 Fed. 623, *supra*, BEATTY, District Judge, held:

"The compensation which a telegraph company is required to pay for the right to construct and maintain its line upon the right of way of a railroad company is the amount of decrease in the value of the use of such right of way for railroad purposes which will result."

That case went to the Circuit Court of Appeals, where it was affirmed, and is found in 111 Fed. 842, *supra*. Other questions than compensation were involved, on which the District Court was affirmed, and the Court of Appeals would not reverse alone because it was claimed the amount of compensation was inadequate; that question being peculiarly one for the trial court rather than a court of error. In *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah), 7 Am. Electl. Cas. 417, 65 Pac. 735, *supra*, the court found as a fact that the part of right of way sought to be condemned by the telegraph company was idle prop-

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erty, and not then used for any purpose by the railroad company, and hence the opinion as to nominal damages. In *St. Louis & Cairo R. Co. v. The Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382, *supra*, the court favored the rule as stated in Syl. 13:

"The measure of damages where a telegraph company condemns a right of way for its use along and upon a railroad right of way is the value of the land actually taken for placing the poles, and the extent to which the value of the use of the portions between the poles and under the wires, for railroad purposes, is diminished by their use by the telegraph company."

In *C., B. & Q. R. Co. v. Chicago*, *supra*, the city of Chicago instituted proceedings to open and extend one of its public streets over the tracks of the railroad, and one of the controversies was over the measure of compensation and damages. The case reached the Supreme Court of the United States, as found in 166 U. S. 266, 17 Sup. Ct. 581, 41 L. Ed. 979. In the consideration of the amount of compensation allowed to the railroad company in the State courts, the Supreme Court of the United States decided that it could not examine the evidence to determine whether the verdict was inadequate or not, inasmuch as its review was confined to fundamental questions of law. As to the lawful measure of compensation on the facts of that case, the court held the following proposition:

"In a proceeding in a State court in Illinois to ascertain the compensation due a railroad company, arising from the opening of a street across its tracks—the land, as such, not being taken, and the railroad not being interfered with only so far as the right to its exclusive enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street—the measure of compensation is the amount of decrease in the value of its use for railroad purposes caused by its use for purposes of a street; the use for the purposes of a street being exercised jointly with the company for railroad purposes."

Other cases cited for defendant in error are not materially different, and we will not review them. Enough is seen in all of them to determine that the competent evidence of the injury and inconvenience to be incurred by creating the second easement are to be the basis of just compensation, and, unless the facts show that no substantial damage will be sustained by the railroad com-

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ny, the court is not warranted in charging the jury that merely nominal damages can be recovered.

The petition for the appropriation in this case detailed the size, height and character of poles to be erected on the right of way, or the five-foot strip thereof, and the other fixtures to be placed along the line. Full inquiry was competent at the trial for compensation to develop what the real situation would be when the telegraph company would have its line completed and in operation. The width and character of the right of way of the railroad along the entire line to be so incumbered is also competent, so that the jury might have as fully as possible what the new use by the telegraph company will be. Of course, it will not and cannot appropriate in fee simple any part of such right of way, nor abridge the right of the railroad company to the use of its entire right of way, except so far as it may be necessary for the new easement to be created and used for a line of telegraph; that is, to plant and erect poles, string the wires, and make a complete line of telegraphic communication, as detailed in the petition for appropriation, and the right to enter and go along the line to make needed improvements and repairs inside the foregoing limits. Another observation in this connection should not be overlooked, and in this respect the statutes of this State may be unlike those of States from which above cases have been taken. Our General Assembly has imposed on railroad companies certain duties in caring for and maintaining their rights of way, so that the public, and especially adjoining landowners, may not suffer from fires which start on railroad premises. Other restrictions are placed upon the use and condition of the right of way. Whatever these imposed obligations may be, we think they may be properly taken into account, inasmuch as the telegraph company does not assume them, nor are they imposed upon it by reason of its joint occupancy of a part of the right of way. It seems quite reasonable that when a telegraph company, by virtue of the statute, condemns to its use a part of the premises of one of the trunk-line railroads of the country for the distance appearing in this case, more than mere nominal damages or compensation may be involved. From the

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best light we have upon the law applicable to this case, we believe the measure of compensation should be the amount which the right of way of the railroad company for railroad purposes is diminished in value by the proposed easement of the telegraph company, or, in other words, the amount of the decrease in the value of the use of such right of way for railroad purposes which will be caused by the appropriation of an easement on the same for the purpose of erecting and maintaining a telegraph line thereon. It may be said that this rule should be modified or limited in its application, because of the provision in the statute authorizing the appropriation, whereby the railroad company at any future time may notify the telegraph company that it needs for railroad purposes a part or all of the ground occupied by it, in which event the telegraph company is required to yield possession and locate elsewhere. We think there should be no such modification for that reason. The appropriating company, desiring to avail itself of a statute containing such a provision, assumes all the risks of being ousted in whole or in part, and ventures upon gaining possession and holding it against the will of the railroad company. The latter does not welcome the new companion, and it may, in course of time, be asked to give way to the needs of the railroad. But it may not comply, and litigation will follow to secure full possession to the owner of the right of way. Of the probability of these sequences, the telegraph company has full knowledge, and it cannot insist that such probable results should mitigate the compensation to be paid for the right of appropriation.

In conclusion, we find that the trial court erred in the charge to the jury, and the Circuit Court erred in affirming the judgment of the former. The judgments of the Circuit Court, the Court of Common Pleas and the Probate Court are reversed, and the cause is remanded to the Probate Court for a new preliminary hearing on the petition, and answer thereto, and for further proceedings according to law. Judgments reversed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK and CREW, JJ.,
concur.

Pennsylvania R. R. v. Lilly Borough.

PENNSYLVANIA R. R. v. LILLY BOROUGH.

Pennsylvania; Supreme Court.

ERECTION OF TELEGRAPH LINE ALONG RAILROAD.—A railroad company having a right to construct a line of railroad over certain land, with all the incidents necessary for its operation and maintenance, has the right to erect upon such lands and along its railroad a telegraph line without interference by the municipality through which it runs; and the purpose which the railroad company has in contemplation in erecting such telegraph line is immaterial.

Appeal by plaintiff from decree refusing a preliminary injunction. Decided Nov. 9, 1903; reported 207 Pa. St. 180, 56 Atl. 412.

The following is the finding of facts by the court below:

"(1) That the Pennsylvania Railroad Company, complainant, acquired from the commonwealth of Pennsylvania, by deed poll dated the 31st day of July, 1857, all of the rights which the commonwealth of Pennsylvania authorized to be granted to a railroad corporation in the New Portage Railroad, etc., by virtue of an act of assembly, entitled 'An act for the sale of the main line of the public works,' approved the 16th day of May, 1857.

"(2) That the line of the New Portage Railroad passes through the borough of Lilly, in Cambria county.

"(3) That the poles in controversy, and which form the subject of contention in this proceeding, were being erected upon the line of the New Portage Railroad, which is owned by the complainant company.

"(4) That the New Portage Railroad, or part thereof, is used as a public thoroughfare of the borough of Lilly, and has been so used for forty years and upwards, in pursuance of an order of court declaring the same a public highway.

"(5) That a line of telegraph poles was located on and along said New Portage Railroad for about forty years, and was removed therefrom by the servants of the Pennsylvania Railroad Company, with leave of the authorities of Lilly borough, within the past three months.

"(6) That Lilly borough is opposing the erection of a new line of telegraph poles, instead of the ones removed, except under certain conditions and restrictions to be imposed by the borough ordinance.

"(7) That the Pennsylvania Railroad Company is admittedly an existing Pennsylvania corporation, and that Lilly borough is a borough located in Cambria county, duly organized and existing under the laws of this commonwealth at the present time.

"(8) That the complainant company, since the purchase of the New Portage Railroad, has not ceased to make such uses of it where the same lies in

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and through Lilly borough, as from time to time became necessary for complainant company."

The material conclusions of law are quoted in the opinion of the Supreme Court.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

H. W. Storey, for appellant.

J. F. McKenrick, *W. Horace Rose*, and *Forest & Percy Allen Rose*, for appellee.

Opinion per CURIAM :

The learned judge below found as a fact that "the poles in controversy, and which form the subject of contention, were being erected upon the line of the New Portage Road; which is owned by the complainant company." He further found among his conclusions of law: "First, That the Pennsylvania Railroad Company has a full and complete right to construct a line of railroad over and upon the land known as the New Portage Railroad, with all of the incidents necessary for the operation and maintenance of such railroad when constructed at any point where the line of said New Portage Railroad lies within the limits of the State of Pennsylvania. . . ." But "inasmuch as we have failed to find as a fact that the complainant company is desirous of erecting a line of telegraph poles and wires for the exclusive use of its railroad line on and along the New Portage Railroad, in the borough of Lilly, the answer having raised the question, and no evidence whatever offered to prove that said line of telegraph poles was being erected for the use of the railroad company, complainant, in the operation of its line of railway, we are constrained to refuse the prayer of the petitioner for an injunction." On these findings, it appears that the complainant was in the exercise of its legal rights on its own premises, and was illegally interfered with by the respondent. The jurisdiction of equity in such cases is too well established to need discussion. The reason

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igned for refusing the injunction is not sufficient. The complainant having the right to build the telegraph line, the purpose which it has in contemplation, and the use it intends to make the line when built, are not within the province of the court to consider in this proceeding.

The objection that no injunction bond was filed by the complainant, made on the argument here, is one that can be obviated by the filing of the bond at any time before the injunction issues. Decree reversed, and injunction directed to be awarded as prayed.

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United States; Circuit Court of Appeals, Ninth Circuit.

CONDEMNATION BY DOMESTIC TELEGRAPH COMPANY SUBORDINATE TO FOREIGN COMPANY.—The fact that a domestic telegraph company, duly incorporated under the laws of Idaho, was organized as an auxiliary of, and subordinate to, a corporation of another State, which owned a majority of its stock, does not affect its *de facto* corporate existence or deprive it of its right to maintain proceedings for the condemnation of the right of way of a railroad company under the laws of Idaho.

CONDEMNATION OF RIGHT OF WAY UNDER GENERAL POWER.—Under Idaho Rev. Stats. sec 5210, a telegraph company may exercise the right of eminent domain. This statute authorizes such a company to acquire the right to erect and maintain its lines along the right of way of a railroad company, provided it does not interfere with the use to which the right of way was already dedicated.

STATUTE AUTHORIZING CONDEMNATION OF RIGHT OF WAY ALREADY ACQUIRED.

—Under Idaho Rev. Stats. sec. 5213, providing that if property is already taken for a public use it must be shown that the public use to which it is to be applied "is a more necessary public use," a telegraph company may acquire by condemnation the right to use a railroad right of way where the court finds that it is necessary, that its use will not interfere with the prior use, and that it is more necessary than such prior use.

SUFFICIENCY OF JUDGMENT.—A judgment awarding a right of way to a telegraph company is sufficient which locates the telegraph line with reference to the road-bed of the railroad; declares that the poles should be erected upon the right of way; designates the manner of erecting such

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poles and the distance from the outer edge of the railroad track; and requires the telegraph company to remove such poles if the railroad company shall at any time require the use of the right of way where they are placed, to such other places as shall be designated.

Error to the Circuit Court of the United States for the Southern Division of the District of Idaho. Decided October 7, 1901; reported 111 Fed. 842.

Parley L. Williams and Snow & McCamant, for plaintiff in error.

J. R. McIntosh and O. W. Powers, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, delivered the opinion of the court:

It is urged that the court erred as to fact and law in finding that the defendant in error was a corporation duly and regularly incorporated under the laws of Idaho, and in ruling that the contention that it was organized to enable a foreign corporation to condemn a right of way "cannot be considered in this case." In the answer it was denied that the defendant in error was a corporation incorporated under the laws of Idaho, or that it had the power to exercise the right of eminent domain, and it was alleged that the Postal Telegraph Cable Company, a corporation of New York, in order to circumvent the policy of the State of Idaho which denied the right of foreign corporations to condemn such right of way, caused certain of its employees to organize a nominal and pretended corporation under the laws of Idaho, and that thereupon the defendant in error was incorporated; that it has no separate existence from said New York corporation; that all its expenses are paid and its business policy dictated by the latter; and that the sole purpose of its organization is to enable the New York corporation to exercise in the State of Idaho the right of eminent domain. The evidence is that the defendant in error was incorporated, and a meeting of its incorporators was held, on July 22, 1899, and that on the same day

as incorporators became directors and held a meeting; that the directors consisted of four citizens of Idaho, and E. J. Nally, who was a resident of Illinois and an employee of the New York corporation; that a resolution was duly adopted authorizing the construction of a telegraph line substantially as described in the complaint, and authorizing the institution of the present suit; that the capital stock of said corporation is \$250,000, divided into 100 shares, of which E. J. Nally subscribed 96 shares, and the other directors one share each. It was shown that no money on account of any of these subscriptions had been paid to the treasurer of the defendant in error, and that the business of the corporation had been conducted under the direction of the New York company. There is nothing in these facts to indicate that the defendant in error was not a corporation *de facto*. It was duly incorporated according to the laws of Idaho. Four of its five incorporators and directors were citizens and residents of that State. Its right to maintain the present suit is not abridged by the fact that the stock subscribed had not been paid for, and that the majority of the stock was owned by another corporation, which conducted its business and controlled its movements. *Day v. Telegraph Co.*, 66 Md. 354, 7 Atl. 608; *Lower v. Railroad Co.*, 59 Iowa, 563, 13 N. W. 718; *Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.), 61 S. W. 684, 51 L. R. A. 936; *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800. In the case last cited it was held that the fact that "one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical; on the contrary, they are separate and distinct legal entities." The plaintiff corporation, in a suit to condemn land to public use, must show its authority to exercise the right of eminent domain, and prove that it has strictly complied with the law. The defendant in such a suit may deny that the plaintiff is duly incorporated, and may cast upon it the burden of proving its corporate existence, but, if the latter show that it is a corporation *de facto*, it is sufficient. The right to further contest its authority to condemn land or to prosecute the objects of its organization be-

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longs only to the State. *McAuley v. Railway Co.*, 83 Ill. 348; *National Docks Ry. Co. v. Central R. Co. of New Jersey*, 32 N. J. Eq. 755; *Railroad Co. v. Miller*, 56 Ind. 88; *Wellington & P. R. Co. v. Cashie & C. R. Lumber Co.*, 114 N. C. 690, 19 S. E. 646; *Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.*, (Mo.) 61 S. W. 684, 51 L. R. A. 936; *Peoria & P. Union Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589; *Reisner v. Strong*, 24 Kan. 410; *Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. 794; *Day v. Telegraph Co.*, 66 Md. 354, 7 Atl. 608. In the case last cited it was held that foreign corporations, and especially telegraph companies, may do business within the State, and acquire and hold necessary property therein, to enable them to prosecute and conduct their business, and to hold such property in their own names, or in the name of an auxiliary local corporation organized for that purpose. In the case at bar no question is made that the defendant in error holds the title to whatever right has been acquired in the condemnation suit. Although it may be a corporation auxiliary to the New York company, formed for the purpose of acquiring and holding a right of way in Idaho under the laws of that State, to be used as part of a telegraph line which traverses many States, it is nevertheless a distinct corporation. It may at any time assert its right to conduct and manage its own business affairs, and the payment of the subscriptions to its capital stock may be enforced whenever it shall become necessary for the protection of its creditors or for other purposes. The plaintiff in error cites certain cases which it is said lead to a conclusion the reverse of that which we have reached. A case much relied on is *Koenig v. Railroad Co.*, 27 Neb. 699, 43 N. W. 423. The Constitution of Nebraska having provided that no foreign corporation shall be entitled to exercise the right of eminent domain, or "to acquire the right of way," etc., unless certain conditions be complied with, it was held in that case that the prohibition to acquire a right of way prevented such a corporation from doing indirectly what it was prevented from doing directly, or, in other words, prevented it from availing itself of the services of another corporation to accomplish the desired result. The suit was brought

obtain an injunction against the foreign corporation. The latter in its answer pleaded and relied upon a right of way acquired in condemnation proceedings "in its behalf," instituted by a certain other railway corporation of the State of Nebraska, and a transfer of such right from the domestic corporation. It was with reference to these facts and to the constitutional prohibition that the language of the opinion was adopted. There is no prohibition in the laws of Idaho against a foreign telegraph company acquiring a right of way in that State, nor has the New York corporation acquired the right of way in the present case. There has been no transfer of the right of way from the defendant in error. The title remains in that corporation. Other cases are cited which sustain the general propositions which are not here disputed, that in a condemnation proceeding corporate organization is an issuable fact, that the condemnor must show that the condemnation sought is for public purposes, and that the court may go behind the allegations of the complaint, and try the question whether the real purpose of the condemnation is private or public.

It is said that the court erred in ruling that property already condemned to a public use under the right of eminent domain cannot, in the absence of express legislative authority, be condemned to a second public use; that the judgment in the first condemnation proceeding is an adjudication of the question of the necessity of that use, and that no second judgment can be had subversive of the judgment so rendered. Attention is directed to the fact that, while in some States special provision is made by statute for the condemnation of a right of way for a telegraph line over and along the line of the right of way of a railway company, no such special provision has been enacted in Idaho, and it is urged that there is no provision of law by which the present proceedings may be sustained. So far as the question of special statutory authority is involved, the contention is well founded. The only special statute conferring upon telegraph and telephone companies the right to occupy property already devoted to public use is found in section 2700 of the Revised statutes of Idaho, which gives permission to construct telegraph and telephone lines along and upon public roads and highways

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which cross the lands and waters of the State. But, by section 5210, telegraph companies are given authority to exercise the right of eminent domain. This provision, standing alone, unaffected by other statutory enactments, would confer upon a telegraph company the authority to condemn a right of way along and upon the right of way of a railway company, provided that it did not in any way interfere with the use to which the right of way was already dedicated. The rule is supported by abundant authority, and may be thus expressed: Property dedicated to a public use cannot be taken for another public use under the general laws conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted. To authorize a second condemnation of such properties to a second use which is subversive of the first, there must be express legislative authority. *Mills*, Em. Dom. secs. 45-47; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812-852; *Lewis* Em. Dom. sec. 269; *Steele v. Empsom*, 142 Ind. 397-406, 41 N. E. 822; *Winona & St. P. R. Co. v. City of Watertown* (S. D.), 56 N. W. 1077; *Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson Co.* (Ind. Sup.), 58 N. E. 837; *Sabine & E. T. R. Co. v. Gulf & I. R. Co.* (Tex. Sup.), 46 S. W. 784; *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co.* (Minn.), 79 N. W. 315-317. In the case last cited, the court said:

"The general rule is that express legislative authority is generally requisite except where the proposed appropriation would not destroy or greatly injure the franchise, or render it difficult to prosecute the object of the franchise, when a general grant would be sufficient. Land already devoted to another public use cannot be taken under general laws, when the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained."

The question in the present case is complicated, however, by the provisions of section 5213 of the Revised Statutes of Idaho, which declares that before property can be taken for a public use it must be shown (1) that the taking is necessary to such use; (2) if already appropriated to some public use, that the public use to which it is so applied "is a more necessary public use." Do these pro-

ons import into the law of the case conditions precedent to the
ond taking, in addition to those which are imposed by the gen-
l rule of law which has been above quoted? We think they do
. Taking the language of the statute, we think it may be fairly
strued as a statutory declaration of the general rule of law
ich would have obtained in the absence of such an enactment.
nsidering the words used, and the general tenor of the law con-
lling the devotion of private property to public use, we think
s statute was intended to provide that property already devoted
a public use might, whenever deemed necessary for the use of a
poration having the authority to exercise the right of eminent
main, be devoted to a second use, which would not interfere with
e first. It was not intended to require that absolute necessity
ould exist for the devotion of the property to the second use. It
s only required that the second use be more necessary than the
st use. A corporation, in instituting condemnation proceedings,
s the general right to select such property as it shall find neces-
ry for its public use. This right is recognized by the courts. No
e can defend against such an appropriation by showing that
me other property would serve the use of the corporation equally
ell. Such property is "necessary" when the corporation asserts
at it has placed its line over it and needs it. Property already
edicated to a public use stands upon the same footing as other
roperty, and is subject to condemnation as is other property, pro-
vided that the second use shall not interfere with the first. The
efendant in error in this case has alleged that this property is nec-
essary for its use, and that it is not necessary for the use of the
laintiff in error. The court has found that these allegations are
ue, and has found that the second use is more necessary than the
rst. As we construe the statutes of Idaho, we find no error in that
onclusion.

It is contended that the judgment is too indefinite, both as to the
right condemned and the property to be taken, to authorize the de-
endant in error to proceed with the construction of its line. There
s no assignment of error which brings this precise point before us

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for our consideration. The assignment is that the court erred in rendering the judgment for the reason that it is erroneous and contrary to law. This is not sufficient to direct attention to a defect in the judgment consisting in its indefiniteness. Nor do we find that the judgment is so indefinite that to render it was plain error which we should notice in the absence of a specific assignment. The judgment, in general terms, locates the telegraph line with reference to the roadbed of the road, which may be considered a fixed monument. It declares that the poles for the telegraph line shall be erected upon the right of way; that they shall be 30 feet in length, planted firmly in the ground at a depth of not less than 5 feet, and not nearer the roadbed than 30 feet from the outer edge of the railroad track, or at such points as may be agreed upon, and that where it becomes necessary to cross the track of the railroad the poles shall be of such height as to prevent interference with the operation of the road; and that, if at any time the plaintiff in error shall need any portion of its right of way where the poles are placed, the defendant in error shall, upon reasonable notice, at its own expense, remove the same to such other points as shall be designated by the plaintiff in error. If there were in the record an assignment of error directly challenging the sufficiency of this judgment, we are not prepared to say that it is so indefinite as to require revision at our hands. In the nature of the case, it was impracticable to designate the precise spot where each telegraph pole should be placed. The judgment advises the railroad company, in a general way, of the position of the proposed telegraph line, and conserves its remedy against invasion of any portion thereof which it may need for the operation of its road.

It is further contended that the court erred in assessing damages. The damages awarded were \$500. When we consider the cost and trouble to the railroad company in obtaining its right of way in the first instance, and the advantage to the telegraph company of locating its line on that right of way rather than on adjacent lands parallel thereto, where it would be required to deal with numerous landowners, and perhaps to prosecute numerous condemnation suits, the amount awarded may appear inadequate; but when it is con-

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considered that the property taken for the telegraph line is of no actual value to the railroad company, and, as the court has found, is not needed by it for the operation of its road, the damages found by the court may not be said to be inappropriate. The principal element of damage to the railroad company consists, perhaps, in the trouble and expense to be hereafter incurred by it in causing changes of the position of the telegraph line in case the company shall require more of its roadbed or make changes in the location of portions of its road. We cannot say that the trial court overlooked any of these considerations in awarding damages, or was misled by any erroneous view of the law in arriving at his conclusion. Such being the case, the finding of the court upon the amount of damages cannot be disturbed upon the writ of error. We find no error for which the judgment should be reversed.

The judgment is affirmed.

Other Cases Relative to Condemnation of Railroad Right of Way by Telegraph Companies.

1. Colorado statute; rights of telegraph company; public use and necessity; petition.—In the case of *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, the court said:

"The several assignments of error argued by counsel for respondent, including those based upon the instructions refused and given with respect to what constitutes a taking for a public use, the necessity for such taking, and the right of petitioner to determine the route and location of its line, except those specially noticed later, may be considered under this proposition: Did the evidence offered on behalf of the respondent and refused, as above noticed, tend to prove that petitioner was not seeking to condemn a right of way for a public use, or tend to establish facts which would defeat the proceeding? Counsel for respondent contends that it does, for the reasons: (1) That this testimony would have established that the right of way was to be subjected to a private use; and (2) there was no necessity for taking a right of way through the lands of respondent. In support of the first proposition it is urged that the articles of incorporation of petitioner disclose that it was organized to sell or otherwise dispose of the lines of telegraph which it might construct or acquire in this State, and that this fact, in connection with the testimony offered to the effect that it was the creature of a foreign corporation, and not its honest intention to operate the line in question except in the interest of and in connection with that corporation, established in law an intent to take the property of respondent for a private use. There is nothing in the spirit or policy of the law which prohibits the same persons from organizing two or more corporations with

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the intention that they shall be operated in conjunction with each other. Neither does the law prohibit a corporation from accepting financial assistance from another. It should be the policy of this State to encourage the construction and operation of competing lines of communication between points within its own borders and those located within other States. In many instances this can only be effected by corporations organized under our laws acting in conjunction with those created under the laws of a sister State. One of the essential attributes of property is the right to sell, and, unless this right is limited by law, it necessarily exists. Further, it appears from the articles of incorporation of petitioner that it is duly organized and existing under the laws of this State, and its charter cannot be attacked in a collateral proceeding. *Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.*, 161 Mo. 288, 61 S. W. 684; *In re New York, L. & W. Ry. Co.*, 35 Hun, 220, affirmed 99 N. Y. 12, 1 N. E. 27; *Frost v. Coal Co.*, 24 How. 278, 16 L. Ed. 637; *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah), 7 Am. Electl. Cas. 417, 65 Pac. 735; *Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co.* (C. C.), 104 Fed. 623; *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho*, 8 Am. Electl. Cas. 267, 49 C. C. A. 663, 111 Fed. 842. In the last three cases cited the identical question presented by the answer of respondent and the testimony offered relative to the good faith and power of petitioner was raised in the same manner as in the case at bar, and in each instance it was held that the matters thus presented were wholly immaterial.

It is urged that, if respondent had been permitted to prove the existence of a highway adjacent to the route upon which petitioner proposes to erect its telegraph line, and also prove that leave to erect such line through certain incorporated towns through which the proposed right of way extends had not been secured from the municipal authorities of such towns, then no necessity for taking the lands of respondent would have been established. In support of this proposition we are referred to section 587, 1 Mills' Ann. St., which provides that telegraph companies organized under the laws of this State may construct their line along and upon the public roads; and section 588, which inhibits such companies from constructing their lines upon the streets or alleys of an incorporated town without the consent of the corporate authorities. The Legislature has vested corporations of the character of petitioner with discretion in locating their telegraph lines. Ordinarily, the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss, which might readily be avoided. *Railroad Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Railway Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Railroad Co. v. Dunbar*, 100 Ill. 110. There was no showing of this character on the part of the respondent. True, it did introduce evidence to the effect that the erection of a telegraph line along its right of way would cause some inconvenience, and might possibly increase the hazard of railroading, but in no greater degree in this particular instance than other railroads must suffer from the erection of tele-

graph lines adjacent to their railroad tracks,—a condition which exists almost without exception along every line of railroad in the United States. On behalf of the respondent it is contended that, in the absence of leave from the municipal authorities of the town situate along the proposed right of way to erect and maintain its line through such towns, and through which the lands sought to be condemned extend, petitioner could not take such lands, because the proceedings must be regarded as an entirety. This question does not concern respondent. If petitioner cannot erect its line of telegraph through the towns in question, except it obtain leave to do so from the corporate authorities, and fails to obtain such leave, respondent is not injured. Petitioner cannot use the right of way situate within the corporate limits of towns except for the purposes for which it is taken. If it never utilizes the right of way within such limits, respondent cannot complain. Petitioner might be able to build its line around such towns, but that certainly can make no difference to respondent. *Railroad Co. v. Kimball*, 61 Cal. 90; *Railroad Co. v. Dunbar*, *supra*.

The motion to dismiss heretofore noticed was also based upon the ground that the petition was insufficient. In support of this claim it is urged: (1) It does not appear from the statements of the petition that the telegraph line of petitioner is to be public; and (2) property held by one corporation for a public use cannot be taken by another for the same purpose and use. The object for which land is taken determines whether or not the use to which it is to be subjected, when condemned, is public. *Denver R. L. & C. Co. v. Union Pac. R. Co.* (C. C.), 34 Fed. 386. In the petition it is alleged that petitioner is a corporation organized for the purpose of erecting and maintaining lines of magnetic telegraph in this State. The law of the State provides that companies may be organized for the purpose of maintaining telegraph lines. Section 587, 1 Mills' Ann. St. The business which such companies are authorized to transact is public in its nature. They must receive and transmit messages from other companies engaged in the same business, and transmit messages tendered by any person. Sections 589, 590. Counsel for respondent recognize that property held for a public use is subject to the eminent domain power of the State, but contend that such property cannot be taken by another to be used for the same purpose for which it is already held. The case made does not fall within the exception claimed. Proceedings in condemnation may be maintained by a telegraph company against a railroad corporation. *Laws 1885*, p. 358. It appears there is already a line of telegraph along the respondent's right of way. The evidence discloses, however, that the proposed line of petitioner will neither interfere with this line nor with the operation of respondent's railroad. There is ample room for all. No property of respondent will be taken which is already devoted to or needed for a public use, and it is, therefore, not in a position to insist that property held by it for a public use will be taken by another for the same or a different use. The mere fact, therefore, that petitioner seeks to condemn a right of way through lands belonging to a railroad company does not render the petition insufficient. The respondent cannot successfully resist the condemnation of such right of way unless it appears that its use was necessary to the main-

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ance and operation of its railroad and the lines of telegraph already erected thereon, or is needed for such purpose. That property held for a public use may be taken under the exercise of the right of eminent domain for the same or a different public use, when such taking does not materially interfere with the uses for which it is already held, has been recognized in a great number of cases in which this subject has been considered. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Southern Pac. R. Co. v. Southern California R. Co.* (Cal), 43 Pac. 602; *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 52 S. W. 106; *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah), 7 Am. Electl. Cas. 417, 65 Pac. 735; *Salt Lake City v. Salt Lake City Water & Electrical Power Co.* (Utah), 67 Pac. 672; *Colorado E. R. Co. v. Union Pac. R. Co.* (C. C.) 41 Fed. 293."

2. Georgia statute conferring power of condemnation authorizes acquisition of railroad right of way by telegraph company; construction of lines.—The official syllabus of the case of *Savannah, Florida & W. Ry. Co. v. Postal Teleg. Cable Co.*, 115 Ga. 554, 42 S. E. 1, is as follows:

"1. The act approved December 18, 1894 (Acts 1894, p. 95), "to provide a uniform method of exercising the right of condemning, taking, or damaging private property" (Civ. Code, secs. 4657-4686), is general in its nature, and applies to all persons, natural and artificial, who come within its purview. The act approved December 20, 1898 (Acts 1898, p. 54), amended the existing law, which provided a uniform method for exercising such right of condemnation, only as to telegraph companies which seek to condemn rights of way of railroad companies for the purpose of erecting thereon lines of telegraph. As amended, the law is general, and by its provisions due process of law is afforded to the railroad companies whose property is sought to be condemned.

"2. The necessity for taking private property for public use is a question for legislative determination, and the provisions of the Code relating to such taking are not, because they fail to provide for a special tribunal to pass upon such necessity, violative of the constitutional inhibition against taking the property of the citizen without due process of law.

"3. The description of the property sought to be condemned, as made in the original notice, was not open to the objection that it was vague and indefinite. The amendment to the original notice was properly allowed, and inured to the benefit of the railway company.

"4. Construing section 4679 of the Civil Code, as amended by the act of 1898, a telegraph company which has proceeded to condemn a sufficiency of the right of way of a railway company for the purpose of erecting a line of telegraph may, pending an appeal from the award of the assessors, lawfully proceed to construct its line on such right of way after it has deposited the amount of the award in the office of the clerk of the Superior Court of the county where such proceedings were had. The record does not show any error committed by the trial judge in granting the injunction."

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3. Effect of Post Roads Act (*U. S. Rev. St. 1878, sec. 5263 ff. [U. S. Comp. St. 1901, p. 3579]*); **right to condemn right of way under general statute.**—We quote the following from the opinion of the court in the case of *Postal Teleg. Cable Co. v. Chicago, I. & L. Ry. Co.*, 30 Ind. App. 654, 13 N. E. 919:

"The act of Congress referred to in appellant's petition is as follows (Rev. St. U. S. [2d ed.] 1878):

"Sec. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under and across navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." (*U. S. Comp. St. 1901, p. 3579.*)

"Sec. 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by law." (*U. S. Comp. St. 1901, p. 3581.*)

It is also provided by an act of Congress (section 3964, Rev. St. U. S. 1878 [*U. S. Comp. St. 1901, p. 2707*]) that "the following are established as post roads: All the waters of the United States, during the time the mail is carried thereon. All railroads or parts of railroads, which are now or hereafter may be in operation. . . ."

In the law of this State, under which the appellant was incorporated, it is provided that telegraph companies "shall have power to acquire, by purchase or otherwise, hold, and convey such real and personal estate as may be necessary and proper for the purpose of erecting and keeping in repair its lines of telegraph and the buildings requisite for their operation," and that "such corporation shall have power to acquire such real estate and right of way as may be necessary for the uses and purposes herein contemplated, under the writ of assessment of damages, as fully as if the act in relation to said writ were incorporated and made part hereof."

We think the law of this State gives to a telegraph company the right and power to condemn land for its right of way upon the assessment and payment of damages, and that the reference in the law above quoted to the act for the assessment of damages adopts so much of that act as is necessary to enable the telegraph company to exercise such power.

We do not need to consider the question as to what rights telegraph companies have, under the acts of Congress heretofore set out, in States where the right of eminent domain had not been granted to them; but, in some of the States where the general right to condemn has been given to telegraph companies, it has been held that the right to construct their lines upon the right

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of way of railway companies was given by the act of Congress, and the means of enforcing the right was provided by the State laws. *Postal Tel. etc. Co. v. Morgan & Co.*, 49 La. Ann. 58, 21 South. 183; *Croswell on Electricity*, sec. 47; *Postal Tel. Co. v. Southern R. Co.* (C. C.), 89 Fed. 190; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. In the case of *Postal Tel. etc. Co. v. Southern R. Co.*, *supra*, the court said upon this subject: 'The same right to construct its lines along the right of way of post roads of the United States is given, under the act of Congress of 1866, to all telegraph companies accepting the provisions of that act (Rev. St. U. S. secs. 5263, 5269 [U. S. Comp. St. 1901, pp. 3579, 3581]); and the petitioner is one of the companies which has complied with all the requirements of this act, and has secured its privileges. But notwithstanding this, before the privilege can be exercised upon lands, the property of private persons or corporations, the consent of such persons must be obtained, or such proceedings must be had as will insure them just compensation. No act of Congress can give the right of taking private property for public purposes without first paying just compensation. Const. U. S. Amend. 5. And although section 8 of article 1 gives Congress power to establish post roads, and to make all laws which may be necessary to carry this power into effect, 'like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by this instrument—among them, that of the fifth amendment.' *Monogahela Nav. Co. v. U. S.*, 148 U. S. 325, 13 Sup. Ct. 622, 37 L. Ed. 463. The mode or method of exercising the right of eminent domain is fixed by the laws of the several States. Such mode or method is exclusive in its character, in ascertaining the amount of the just compensation to be allowed. See *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188. The Federal courts do not interfere with it, provided due process of law be furnished. *Chicago, B. & Q. R. Co. v. City of Chicago*, 186 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978. This being the case, we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands of right of way, for the conduct of the procedure, and for the steps by which the just compensation is reached.'

We think the law as stated in the case quoted from is correct, and founded in reason and supported by the weight of authority. So we must conclude that the law of our own State furnishes appellant with ample power to secure the rights asked for in the complaint, and that the right given under the Federal statute, when aided by a State law conferring the right of eminent domain, is ample for the purpose of securing the right herein petitioned for.'

4. South Carolina statute authorizing condemnation of railroad right of way by telephone company; constitutionality.—In the case of *South Carolina & Georgia R. Co. v. American Teleph. & Teleg. Co.*, 65 S. C. 459, 43 S. E. 970, it was held that under the act of February 23, 1899 (29 Stats. at Large, p. 61), providing for the construction of telephone lines over or under lands of any person, company or corporation, and making special provision for the construction of lines on the rights of way of railroad com-

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panies, a telephone company can acquire by condemnation the right to erect and maintain its lines over the right of way of a railroad company, held by it under a title in fee or acquired by condemnation. Such statute is not a violation of the fourteenth amendment of the United States Constitution, as not affording equal protection of the laws, in that it allows only one proceeding in one county to condemn a way in many counties, and because there is no provision for the inspection by the jury of the right of way. Nor is the act unconstitutional as not furnishing due process of law, in that it does not provide for making all persons having an interest in the land parties, nor does it provide that the telephone company shall, after construction, help to maintain the right of way.

5. Condemnation of railroad right of way independent of statute; selection of location; appraisal of damages.—In the case of *Postal Tel. Cable Co. v. Oregon State Line R. Co.*, 23 Utah, 474, 65 Pac. 735, the following principles were declared:

(a.) Land which is a part of a railroad's right of way, but not used for any purpose and not essential to the enjoyment of such railroad's franchise and property, may be appropriated to the use of a duly incorporated telegraph company for the purpose of constructing and maintaining its lines, since such appropriation is for a more necessary public use.

(b) Where a telegraph company makes a *bona fide* effort to agree with a railroad company on terms for the use of land in its right of way for the construction of the former's lines, and the latter refuses to negotiate, a necessity is shown to exist for the taking of a right of way for the lines, though there may be other land equally available.

(c) Where such company exercises the power of eminent domain in good faith, and is not guilty of oppression, its discretion in the selection of land will not be interfered with by the courts.

(d) Such a company has the power to construct a telegraph line longitudinally on a railroad's right of way, in the absence of legislative authority, where such construction will not materially interfere with the use of such land for railroad purposes.

(e) A telegraph company, seeking to condemn a railroad's right of way for its lines, cannot be authorized to enter into possession and construct the lines until it has paid a just compensation therefor, to be ascertained by resorting to the State statutes.

(f) Where a railroad company's right of way has been condemned for the use of a telegraph company in constructing and maintaining its lines, the measure of damages is the decrease in the value of such way for railroad purposes.

(g) In an action to condemn a railroad's right of way for the use of a telegraph company, evidence to show damages from the added expense of burning grass from such way by reason of the erection of telegraph poles is not admissible, since such damages are too remote.

(h) Where a telegraph company has a right to condemn a right of way on the right of way of a railroad, the damages to be paid the railroad company

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are nominal, since the telegraph company does not interfere with the railroad's right of way.

6. Condemnation under Arkansas statute; necessity for taking; constitutionality; description of routes.—In the case of *St. Louis & San Francisco R. Co. v. Southwestern Teleph. & Teleg. Co.*, 121 Fed. 276 (C. C. A., 8th Circ.), the following propositions were sustained:

(a) The act of March 31, 1885, Act No. 107, p. 176, Acts Ark. 1885 (sections 2757, 2758, 2770, Sandels & H. Dig.), which grants to telephone and telegraph companies the right to condemn the right of way along railroads, highways, and post roads, and provides that the proceedings thereunder shall be conducted as prescribed in sections 2770-2781, inclusive, Sandels & H. Dig., is constitutional and valid.

(b) The necessity for the taking by a corporation of the easement or property sought in condemnation proceedings is a judicial question, to be determined by the court upon a consideration of the power of eminent domain granted to the corporation, and the facts and circumstances of the case.

(c) Where the Legislature has granted to a telephone company the right to condemn an easement on the right of way of a railroad company for the construction and operation of a telegraph and telephone line, with a proviso that the ordinary use of the right of way by the railroad company for its purposes shall not be thereby obstructed, the issue regarding the necessity of the taking of the easement sought by the telephone company is limited to two questions, namely:

(1) Will the use of the right of way by the railroad company be substantially obstructed by the use of the easement sought?

(2) If the telephone company is to acquire an easement for its purposes on the railroad right of way, is the location and character of the easement which it describes and seeks to acquire such that this easement is necessary for its use?

The question whether the telephone company could construct and operate its lines on other property, so that there is no real necessity for it to acquire any easement on the railroad right of way, is not open to determination under such a law, because the Legislature has granted the right to acquire the easement notwithstanding the fact, which must have been patent to it, that telegraph and telephone lines might in every case be constructed elsewhere than upon the railroads and highways mentioned in the statute.

(d) A description of the routes of lines of telegraph or telephone to be constructed, in the articles of incorporation of a telephone company, is not indispensable to the acquisition of the power to condemn the right of way for such lines, under sections 1326, 1328, Sandels & H. Dig., if the general purpose of conducting a telegraph or telephone business throughout the State is plainly stated therein.

7. Post Roads Act; Montana statute authorizing condemnation; compensation.—In the case of *Postal Teleg. Cable Co. of Montana v. Oregon Short Line R. Co.*, 114 Fed. 787 (Circ. Ct., Dist. of Mont.), it was held:

(a) A telegraph company which has accepted the conditions imposed by U. S. Rev. St. secs. 5263-5269 is entitled to construct its line over the right of

way of a railroad which, by section 3964, is declared to be a post road of the United States and to have the damages assessed in any court of competent jurisdiction, where such line may be constructed as not to interfere with the operation of the railroad.

(b) Under the statute of Montana (Code Civ. Proc. p. 3, title 7) which confers on certain corporations, among which are telegraph companies, power to exercise the right of eminent domain, subject to the limitation that the court must find that the use sought to be made of the property condemned is a public use, and, if the property has already been appropriated to a public use, that the second is a more necessary public use, it must be held that the use of land for a telegraph line is a public use, and that the appropriation for telegraph purposes of a portion of the right of way of a railroad not occupied for railroad purposes is for a more necessary public use than that of the railroad company.

(c) Where the construction of a telegraph line over the right of way of a railroad will not appreciably diminish the value of the use of such right of way for railroad purposes, the telegraph company is required to pay only nominal damages on condemnation of a right of way for its line.

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RIGHTS OF OWNER OF FEE OF RAILROAD RIGHT OF WAY.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. v. SNYDER.

Iowa; Supreme Court.

I. RIGHT OF OWNERS OF FEE OF RIGHT OF WAY OF RAILROAD TO RENTS AND PROFITS RECEIVED FROM TELEGRAPH COMPANY.—Where a railroad company has an easement in lands granted for the use of its railroad and has leased to a telegraph company the right to use such easement for its poles and wires, the owner of the fee is not entitled to an accounting of the rents and profits received by the railroad company from the telegraph company, although an additional servitude was created upon the land by such lease.

Appeal by defendant from judgment for plaintiff. Decided May 21, 1903; reported 120 Iowa, 532, 95 N. W. 183.

In 1881 the plaintiff instituted condemnation proceedings for a right of way 100 feet wide across the land now owned by the defendants, but then owned by the grantor, one Jones. Jones appealed from the award of damages made by the sheriff's jury, and the case appealed was afterwards transferred to the United States Circuit Court for the Northern District of Iowa, where it was finally settled by stipulation, and a decree entered confirming the proceedings and establishing a right of way to a strip 100 feet wide across said land, described more particularly as "being a strip of land fifty feet on each side from the center line of said railway, as now located thereon, in Linn county, Iowa." The right of way established by the decree passed in front of the dwelling house on the premises then occupied by Jones, and so near thereto as to take a part of the front yard, in which shade and other ornamental trees were growing. When the road was built, however, no part of the yard was disturbed. It was fenced at the time the proceedings were begun, and when the decree was rendered. Afterwards, when the plaintiff fenced its right of way, it built up to the yard fence on each side and connected therewith. This was the condition of the fence and the yard when the defendants bought the land, and so it remained until this action was brought. The defendants' deed made no reservation of any of the right of way, and they claim that when they bought they were told by Jones that the right of way did not include any part of the dooryard, because of an agreement with the plaintiff that it should remain undisturbed. In 1895 the plaintiff undertook to extend its right of way fence across the yard on the south line of the condemned

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strip, and, being prevented from so doing by the defendants, brought this action to quiet its title to the disputed piece of land inclosed within the doorway fence. The defendants pleaded adverse possession, and averred that the plaintiff had leased the same, with other lands, to a telegraph company, for the use of its poles and wires, and had received a large revenue therefrom; that such use of the right of way created an additional servitude on the land; and that they were entitled to an accounting, and a portion of the rents and profits so received. A demurrer to the cross-petition was filed, but does not seem to have been ruled upon.

Preston & Moffit, for appellants.

J. C. Cook and *H. Loomis*, for appellee.

Opinion by *SHERWIN, J.*:

There is nothing in the defendants' counterclaim. If an additional servitude has been imposed on the defendants' land, it is clear that they have no right to an accounting of the rents and profits received by the plaintiff from the telegraph company. The appellants claimed, and introduced testimony tending to support the claim, that when the damages were originally assessed, and when the stipulated decree was rendered in the Federal court, the injury to the dooryard was expressly excluded from consideration because of the promise made by the plaintiff's agent and attorney that it would never molest or disturb the owners' use thereof; and it is contended that, because of the alleged agreement and understanding, the defendants and their grantors held adversely to the plaintiff under a claim of right, and acquired title thereby to the land in question. The defendants and their grantors have always owned the fee title of the entire right of way, and the plaintiff's interest therein has been an easement only. If the defendants' grantors had conveyed this easement by deed, describing and defining it as was done in the decree, their continued possession of the doorway for yard purposes, the same as it had theretofore been used, would not set the statute of limitations in motion, for, if the grantor continues in possession after conveyance, he will be regarded as holding in subserviency to the grantee, either as his tenant or trustee, "and nothing short of an explicit disclaimer of

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the relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee." 1 Cyc. 1039. The stipulated decree had all of the force and effect that a direct conveyance could have had, and the owner's continued possession of the land thereafter could by no possibility place him in a better position than he would have been in, had he executed and delivered a deed to the plaintiff. While the plaintiff was entitled to the possession and control of its right of way whenever it should deem it necessary to use it in the conduct of its business, it cannot be said, as a matter of law, that it might not consent to any use thereof which would not interfere with its duties to the public, and we find nothing in the record indicating that the possession or use of the yard by the defendants' grantors was in any way inconsistent with the plaintiff's right of possession or its necessities during the time in question. *Slocumb v. The C., B. & Q. R. Co.*, 57 Iowa, 675, 11 N. W. 641.

Nor can the fact that before the final decree there was a promise not to disturb the owners' use of the yard change the rule above announced. The decree settled the parties' rights thereto, and clearly defined what they were, and all prior agreements were merged therein. The plaintiff had the right to rely fully thereon, and to presume that the owners' continued possession of the land was subservient to the easement created thereby. When the defendants bought, they were told that the yard was reserved from the right of way grant, and they continued in the possession and use thereof just as had their grantor. There was no change in the physical conditions, and no outward sign that they were making a greater claim thereto than he had made. Nor did the plaintiff have knowledge of the representations made to the appellants by their grantor. It then had the right to presume that the defendants' possession was subservient to its estate, as had been their grantor's; and unless there was some unequivocal act on the part of the defendants, brought home to the knowledge of the plaintiff, indicating a hostile intent, their possession was not adverse. We find nothing of this kind in the record. *Slocumb v. The C., B. & Q. R. Co.*, *supra*. True, there was no reservation of

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the right of way in the defendants' deed, as was the case in *Slo-umb v. R. Co.*, but we are unable to see how this can affect the result, for, conceding that the defendants were holding under a good faith claim of right or title, they have failed to prove that their possession was adverse to or inconsistent with the plaintiff's right to the land whenever it became necessary for the proper convenience and use of its business.

This is so largely a fact case that we do not deem it necessary to review the cases cited in support of the contention of counsel. The judgment is affirmed.

Rights of owner of fee of railroad right of way; compensation to owner of fee where right of way is taken by telegraph company.—In the case of *Phillips v. Postal Teleg. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, the plaintiff sought to recover compensation of the defendant for its use of the right of way of a railroad, the fee of which was in the plaintiff. The defendant contended that it had the right to use the right of way under the provisions of the Post Roads Act (U. S. Rev. St. secs. 5263-5268), and that it had acquired such right by the consent and upon payment of compensation to the railroad company. The railroad company had abandoned such right of way, and was no longer in possession thereof. The court held that the Post Roads Act did not authorize the telegraph company to acquire such right of way without compensation to the owner of the fee. It was also held that the use by the telegraph company was an additional burden, and that the owner of the fee was entitled to compensation. In this connection the court said:

"The defendant again contends that as its poles are located on the right of way of the railroad company (that is, its potential right of way), and as it has acquired its easement from the railroad company by condemnation proceedings under the Code, it owes no further duty to the owner of the land. We cannot concur in this view. The land on which the poles are situated is not in the actual possession of the railroad company, and apparently never has been. On the contrary, it has been in constant cultivation by the plaintiff and those under whom he holds. The nature of the easement acquired by railroad companies under condemnation proceedings has been too recently considered by this court to require further discussion. *Shields v. Railroad Co.*, 129 N. C. 1, 39 S. E. 582. In that case the court says, on page 4, 129 N. C. and page 583, 39 S. E.: 'It therefore seems to be the settled law in this State, so far as judicial construction can settle a question, that a railroad company by condemnation proceedings only acquires an easement upon the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of its road, and to protect it against contingent damages.' It is not contended that the lines of the defendant are in any degree essential to the operation of the railroad. On the contrary, it is stated

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in the opinion of the court in the proceedings under which the defendant claims to have acquired its easement that 'the railroad company denies altogether that any benefit or advantage can arise to it in the erection of the telegraph lines, and, on the contrary, avers that it is detrimental to it in the last degree.' *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190, 196. Under the circumstances, it is clear that the additional easement claimed by the defendant is an additional burden upon the land, for which the owner is entitled to just compensation. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, *supra*; *Daily v. State*, 5 Am. Electl. Cas. 186, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Telegraph Co. v. Pearce*, 3 Am. Electl. Cas. 169, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; *Keasbey, Electric Wires*, sec. 185. The Maryland case is an able and elaborate discussion of the entire question. The kindred question involving the same principle, of railroads upon streets, is fully considered in the well-known cases of *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. 528, in which it was held that the abutting owners were entitled to compensation for the additional burden imposed upon the streets by the elevated roads. *White v. Railroad Co.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, is also a well-considered case in our own Reports."

"The plaintiff was not a party to the condemnation proceedings, nor have any proceedings been instituted against him by the defendant to acquire an easement or any other right. The defendant relies upon that part of section 2010 of the Code, which says: 'And if the use or right sought be over or upon an easement or right thereby, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.' Here the defendant stops, but the Code immediately proceeds to say: 'Provided that only the interest of such parties as are brought before the court shall be condemned in any such proceedings.' By the very terms of the statute, the plaintiff now stands as if no condemnation proceedings had ever been brought."

PART III.

CONTRACTS WITH MUNICIPALITIES FOR ELECTRIC
LIGHT.

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VALIDITY OF ELECTRIC LIGHT CONTRACTS.

DENVER, CITY OF, v. HUBBARD.

Colorado; Court of Appeals.

CONTRACT TO FURNISH LIGHT; CONSTITUTIONALITY; DEBT LIMIT.—A contract whereby an electric light company agrees to furnish light to a city for a term of ten years at a specified annual price, does not constitute a violation of the Constitution (Colo. Const. art. 11, sec. 8) limiting the extent and amount of municipal indebtedness, where the annual sum payable does not increase the indebtedness beyond the limit, although the aggregate sum called for by such contract would produce such effect.

APPROPRIATION OF MONEY TO MEET PAYMENTS.—The contract is not invalid under art. 6, sec. 10 of the Denver charter (L. 1893, p. 200), prohibiting the city council from ordering the payment of any money in excess of the amount appropriated for the current year, and also prohibiting the execution of a city contract providing for the payment of city money until a definite amount of money shall have been appropriated therefor; under such statute the council is not required to appropriate sufficient money to meet the aggregate amount to be paid under the contract, but the statute is fully complied with by providing annually for the amount payable under such contract.

UNREASONABLE LENGTH OF TIME.—Ten years is not an unreasonable length of time for the running of a contract to furnish electric light to a city.

MONOPOLY.—Such a contract does not create or tend to create a monopoly, and is not for that reason invalid.

SURRENDER OF LEGISLATIVE POWER.—The execution of such a contract is in the exercise by the municipality of its contractual, private proprietary or business powers, so to speak, and not of its governmental or delegated legislative powers; hence it is not liable to the charge that the execution of the contract would, for the term thereof, operate as a surrender of the legislative powers of the city council.

EXCESSIVE PRICE; VALIDITY NOT AFFECTED BY SUBSEQUENT OFFER TO FURNISH LIGHT AT A LESS PRICE.—An offer made by another company to furnish light at a less price than that stipulated in the contract will not affect the validity of the contract, where it appears that such company has formerly furnished light under a contract with the city, and had refused to lower its price until convinced that the contracting company was a competitor.

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Appeal by defendants from decree in favor of complainant.
Decided April 14, 1902; reported 68 Pac. 993.

H. M. Orahood and H. L. Ritter, for appellant City of Denver.

Henry J. O'Bryan and H. Riddell, for appellant Lacombe.

Yeaman & Gove, for appellee.

Opinion by WILSON, P. J.:

On and prior to February 14, 1901, there was in the city of Denver only one electric light and power plant capable of supplying an electric current for the lighting of the streets of the city, the homes of its inhabitants, and for commercial purposes generally. Up to January, 1900, this company, under contract with the city, had lighted the streets, receiving therefor the sum of \$100 per annum for each arc light. Subsequent to this time, and up to the completion of the new plant hereinafter mentioned, the company had furnished such street lighting, but not under contract with the city, and had been receiving therefor the sum of \$90 per annum for each arc light. On February 14th, before mentioned, the council of the defendant city passed an ordinance whereby Charles F. Lacombe, one of appellants, and his assigns, were granted the right and privilege to construct, maintain, and operate in the city a street arc electric light and power plant, and also a commercial electric light and power plant, for the purpose of producing and transmitting an electric current for lighting, heating, and power purposes, for use of the said city of Denver, and residents and citizens thereof, and to erect poles, string wires, etc., along the streets and alleys of the said city for this purpose. Specifications and conditions were inserted as to where and how the plant should be constructed, its kind, capacity, etc. The ordinance further provided for, and upon its acceptance by Lacombe and his assigns was, a contract between the city and Lacombe for lighting the streets, and a similar contract, other than the one arising from the acceptance of the ordinance, was executed between the city and Lacombe.

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the construction of the arc lighting plant was to be completed within 90 days, and of the commercial plant within four months, from the passage of the ordinance. The contract was for the lighting of the streets of the city for a period of 10 years, at the price of \$75.50 per month, or \$90 per annum, for each arc light, and for such additional arc lights in excess of 1,000 as might be required by the city during the continuance of the contract the sum of \$70 per year for each arc light. The city covenanted that it would use not less than 1,000 arc lights. The ordinance and contract reserved the right to the city to purchase the arc lighting plant at the end of any year at a constantly reducing price, which was fixed for each year in the contract, and it was also provided that the plant should not be sold or combine with any other electric lighting plant in the city. With reference to the commercial plant, a maximum rate to be charged private consumers, residences, business houses, etc., was fixed, and it was provided that the city might purchase this plant at the end of five-year periods, at a price to be fixed in a manner provided in the ordinance. It was further agreed that Lacombe and his assigns should pay into the city treasury 3 per cent. per annum of the gross revenues that might be received from the commercial plant. In an agreed statement of facts, it was stipulated that the city had not at any time appropriated a definite sum of money, or any amount of money whatever, for the liquidation of any liability which it might incur by reason of such ordinance or contract, unless the ordinance itself operated as an appropriation, except by the passage of the annual appropriation ordinance of the city on January 17, 1901, which contained the following provision: "Electric Light and Gas. There is hereby appropriated to the electric light and gas department, the sum of ninety thousand dollars (\$90,000) for the public lighting of the streets of the city of Denver by arc electric lights of two thousand standard candle power, running all night, every night in the year, and also for the payment of gas and electric light bills in the different city buildings, outside of the fire and police departments; provided, that not more than one-quarter of said amount shall be expended in any one quarter of the year, unless authorized expressly by the city council;

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provided, further, that not more than ninety dollars each per annum shall be paid for arc electric lights of two thousand standard candle power each. And the city council hereby reserves the right to direct the expenditure of the amount hereby appropriated as said council from time to time determine." It was further stipulated that neither the contract with Lacombe and his assigns, nor the expense to the city resulting therefrom, was rendered necessary by any casualty, accident, or unforeseen contingency happening after the passage of the last annual appropriation ordinance by the city council of the city of Denver, and that neither the ordinance nor the contract had ever been recommended or approved by the board of public works, nor had the said board of public works, nor the city, nor any officer nor department thereof, in any manner advertised for bids for lighting the streets and public grounds of the city. It was further stipulated that the ordinance was passed and the contract entered into by the city in order to afford the city and its inhabitants the benefit of competition in the price of electric light and power between the old company and the proposed new company, and that it was impossible to secure the benefits of such competition and the erection of a competing plant without entering into the contract set forth in the ordinance with Lacombe and his assigns, or some other company, corporation, or person. Also that since the commencement of this action the old company had, for the purpose of meeting the competition afforded by defendant Lacombe and his assigns, materially reduced the rates charged by it for commercial lighting. It was also agreed that at the time of the commencement of this action the amount of the appropriation for the lighting of the streets and buildings of the city in the annual appropriation ordinance of January 17, 1901, remained unexpended, with the exception of about \$11,000 paid out for lighting subsequent to January 1, 1901. The plaintiff, a taxpayer of the city, commenced this suit February 16, 1901, assailing the validity of the ordinance and contract, and praying an injunction restraining the defendants from carrying it into effect. The decree of the court granted the relief substantially as prayed for, the contract being held null and void, and from this defendants appeal.

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To establish the invalidity of this ordinance and contract, the grounds chiefly relied upon are: (1) That it was in violation of and prohibited by the Constitution of the State; (2) that it was and is prohibited by the charter of the city of Denver. There are some other objections which possibly may not in terms come strictly within these two grounds, but they will be adverted to and considered during the course of this opinion.

1. The constitutional objection is based upon the provision of the State Constitution limiting the extent and amount of municipal indebtedness, it being claimed that this contract would operate to create a municipal indebtedness in excess of the constitutional limit. Const. art. 11, sec. 8. It was stipulated that at the time when the contract was entered into the indebtedness of the city had not reached the constitutional limit by the sum of \$225,000. If, therefore, the contract created an indebtedness such as was embraced within the constitutional inhibition, and such indebtedness was for the aggregate amount of the total minimum payments to be made during the 10-year life of the contract, to wit, the sum of \$900,000, it is apparent that the constitutional limitation would, of course, be exceeded. If, however, even though it be conceded that the contract did create a debt within the meaning of the Constitution, but the debt was only in the amount to be paid in any one year, to wit, \$90,000, then the indebtedness so created would not exceed the constitutional limitation. There is much force in the contention that a contract like this does not create a debt within the meaning of the Constitution, and that no debt exists or comes into being until after the expiration of a period fixed in the contract for payment, and this is the view taken by many highly respectable authorities. It is not necessary, however, for the determination of this appeal, that this question should be considered and definitely passed upon. It is immaterial, for the purposes of this case, how that question may be settled, because, if the mere execution of the contract created a debt at all within the purview of this constitutional provision, the extent of the debt was only the amount of the annual payment provided for, which is \$90,000, and hence it was clearly and safely within the prescribed constitutional limi-

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tation. This doctrine, which has been much discussed and frequently passed upon, is, as applied to this class of cases, founded upon sound reason and principle, and is supported by an overwhelming weight of authority. We cite in support of it a number of the leading and best-considered authorities, but by no means all. *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 19, 19 Sup. Ct. 77, 43 L. Ed. 341; *Saleno v. City of Neosho*, 127 Mo. 639, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; *Lamar Water & Electric Light Co. v. City of Lamar*, 140 Mo. 156, 39 S. W. 768; *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 339; *Crowder v. Town of Sullivan*, 128 Ind. 487, 28 N. E. 94, 13 L. R. A. 647; *Seward v. Liberty*, 142 Ind. 554, 42 N. E. 39; *City of Helena v. Mills*, 36 C. C. A. 1, 94 Fed. 919; *Dwyer v. City of Brenham*, 65 Tex. 526; *Stedman v. City of Berlin*, 97 Wis. 512, 73 N. W. 57; *McBean v. Fresno*, 112 Cal. 167, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; *City of Chicago v. Galpin*, 183 Ill. 407, 55 N. E. 731; *Cunningham v. City of Cleveland*, 39 C. C. A. 218, 98 Fed. 357; *Utica Water Works Co. v. City of Utica*, 31 Hun, 426; *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 491, 78 N. W. 558; *Appeal of City of Erie*, 91 Pa. 398; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *New Orleans Gaslight Co. v. City of New Orleans*, 42 La. Ann. 188, 7 South. 559; *Grant v. City of Davenport*, 36 Iowa, 396; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; 1 Dill. Mun. Corp. (4th ed.), sec. 136a.

In the *Walla Walla* case, in which all of the justices concurred in the opinion, it was said, after referring to a few cases which hold the contrary doctrine:

"But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute

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debt is created at once, as by the issue of railway bonds, or for the erection of public improvement, though such debt be payable in the future by installments. In the one case, the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed. In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished."

In an elaborate note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 223 (s. c. 24 S. W. 872, 23 L. R. A. 402), by Judge FREEMAN, the distinguished legal author, on this subject of what is within the meaning of prohibitions against municipal indebtedness, it was said, on page 240:

"But where the contract or ordinance is one intended to provide for the furnishing of the municipality with water to be used for public purposes, or with lights for the streets or other public places, and payment is to be made for such water or lights from year to year, this is but a mode of providing for the necessary current expenses of the municipal government; and while it is true the municipality has no discretion not to become liable from year to year for the amount which it has agreed to pay, yet the almost overwhelming weight of authority is that it is not to be regarded as indebtedness within the meaning of these constitutional or statutory limitations, except for the amount which has actually fallen due under the contract or ordinance, and that it must therefore be sustained, although the amount which will ultimately become due under it may greatly exceed the limit of indebtedness which the municipality is authorized to incur."

In *Saleno v. City of Neosho*, *supra*, cited approvingly in the *Walla Walla* case, *supra*, the court said:

"A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and, if not furnished, no payment could be required of it."

There are some cases to the contrary, but upon close examination it will be found that in the great majority of them the decision turned upon the fact that the municipality at the time of making the contract had already reached the limit of its indebtedness, or so nearly so, that the making of the first annual payment would have carried it beyond such limit, or that in the Constitution other

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language or words beside the mere word "debt" or "indebtedness" was used, showing an intent to give to the word "debt" a more extended meaning and broader significance than that usually accorded to it. Nearly all are susceptible of some explanation, which shows them to be not in conflict with this doctrine. Such are the Montana cases, cited by the appellee: *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *State v. City of Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336, 81 Am. St. Rep. 453. Both of these cases were considered by the Federal Circuit Court of Appeals in a late Montana case. *City of Helena v. Mills*, 36 C. C. A. 1, 94 Fed. 917. It was there said, referring to them:

"Both cases are in harmony with the general doctrine, established by the decided weight of authority, that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned, but that, if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor."

Lake County v. Rollins, 130 U. S. 662, 9 Supp. Ct. 651, 32 L. Ed. 1060, is explained in the *Walla Walla case*, *supra*, and held not to be in conflict with the doctrine announced in the latter case. *Niles Waterworks v. City of Niles*, 59 Mich. 313, 26 N. W. 525, is cited as maintaining the contrary doctrine. The question there presented, though somewhat similar, was not exactly like the one now under discussion. The case seemed to turn upon the exceedingly broad and comprehensive language used in a provision of the charter of the defendant city under consideration. However this may be, the Michigan Supreme Court, in a much later and very recent case (*Ludington Water Supply Co. v. City of Ludington*, *supra*), passed directly upon the question here presented. It said:

"The charter itself limited the authority of the council with respect to incurring indebtedness, but the rule that a contract for future services, to be paid for as rendered, is not an incurring of indebtedness, is supported by binding authority."

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In support of this, the court cited a number of authorities, which are cited in the *Walla Walla* case, and which we have cited in this. In *Salem Water Co. v. City of Salem*, 5 Or. 29, the charter inhibition involved was as broad and comprehensive as language could make it. The city was prohibited from creating "any debt or liabilities which shall singly or in the aggregate exceed the sum of one thousand dollars." The case arose upon a contract for water whereby the city bound itself to pay in quarterly installments \$1,800 per annum for a period of 17 years. The main and only question to be determined was whether any debt or liability was created by the contract. Upon that question only the case is authority; but that is not the question before us. Manifestly, if that contract created a debt or liability for one year only, it would have been void, because the debt or liability would have been in excess of the amount allowed by the city charter. Whether the debt or liability, if created, would have been only the amount to be paid during one year, or the sum of the payments provided to be made during the entire 17 years, was not in the case.

There are a few cases of very respectable authority squarely to the contrary, notably one from Georgia. *City Council of Dawson v. Dawson Water Works Co.*, 106 Ga. 697, 32 S. E. 907. This involved a contract by the city for water, annual payments for which, in specified amounts, were to continue for a period of 20 years. It was held that, within the meaning of the State Constitution and intent of its framers, the contract created a debt the aggregate amount of which was the sum of the annual rentals stipulated to be paid during the entire term, and therefore that it was illegal, and not binding, except for the first year. It plainly appears that in reaching this conclusion the court was influenced to a large extent by a consideration of the history of the peculiar state of public affairs existing in Georgia antecedent to and concurrent with the adoption of the constitutional inhibition. This it was held clearly evidenced the intent of the convention to have been in accord with the conclusions of the court. It was frankly stated in the opinion, however, (page 714, 106 Ga., and page 914, 32 S. E.), that the ruling of the court was "in direct conflict with a decision of the highest

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court in the land as well as with the current of American authority on the subject." It does not appear to us, from current history or otherwise, that the condition of public affairs in Colorado at the time when its Constitution was adopted was such as to justify us in following the Georgia precedent, and in thereby ignoring the current of American authority, including a unanimous decision of the highest court in the land.

Finally, it may be said, as showing that the doctrine announced by the weight of authority is supported by reason and principle, that a contrary holding would, it is a matter of common knowledge, in numerous instances work disaster to municipalities and their inhabitants. Water and light are absolute necessities in towns and cities, as essential almost as air, and the construction and operation of plants for these necessities, it is univarsally known, require the expenditure of very large sums of money. As a business proposition, susceptible of being understood by those of ordinary intelligence only, it is also universally known and recognized that a town or city is unable to secure the erection of the necessary plant unless it is able to contract in advance with such person or company to use light to be furnished for some period of time. As said by this court in *Leadville Illuminating Gas Co. v. City of Leadville*, 9 Colo. App. 403, 49 Pac. 268:

"If a city were not allowed in such case to contract for light for some reasonable period of time, and the individual or company furnishing light was compelled to trust for his compensation from year to year to the varying moods of city councils, it is safe to say that no one would engage in such a hazardous enterprise."

For these reasons, we believe that neither the ordinance nor the contract was obnoxious to the State Constitution.

2. Was the contract invalid and void *ab initio* because of the failure on the part of the city council to make the necessary prior appropriation of money to cover the debt or liability created thereby, as required by section 10, art. 6, of the city charter then in force, which reads as follows:

"The city council shall not order the payment of any money for any purpose whatever, in excess of the amount appropriated for the current year, and at

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the time of said order remaining unexpended in the appropriation of the particular class or department to which such expenditures belong. Neither the city council nor any officer of the city shall have authority to make any contract, or do anything binding on the city, or imposing upon the city any liability to pay money, until a definite amount of money shall have been appropriated for the liquidation of all pecuniary liability of the city under any such contract, or in consequence thereof; said contract to be *ab initio* null and void as to the city for any other or further liability: provided, first, that nothing herein contained shall prevent the city council from paying any expense, the necessity of which is caused by any casualty, accident or unforeseen contingency, happening after the passage of the annual appropriation ordinance; and, second, that the provisions of this section shall not apply to or limit the authority conferred by sections 7, 8 and 9 of this article, nor to moneys to be collected by special assessments for local improvements." Sess. Laws 1893, p. 200.

Sections 7, 8 and 9, which are excepted from the provisions of this section, are sections empowering the city to contract indebtedness for any one or more of various purposes specifically mentioned therein, but public lighting is not one of them. It is admitted that in January, immediately preceding the time when this contract was entered into, the city council, in its annual appropriation bill, included an item of \$90,000 for the public lighting of the streets of the city by electric lights, and also for the payment of gas and electric light bills in the different city buildings during the current year. It is true that it was not recited in the bill that this appropriation was for the express purpose of paying the bills which might be incurred under this contract, designating the company or contractor by name, but we think this was not necessary. It covered the subject of lighting, and that was entirely sufficient to meet the requirements of the section which we have quoted, so far as the expense incurred under this contract for lighting during the first year was concerned. It is contended, however, by counsel, and it was upon this ground that the trial court based its judgment, that, as the contract was to run for 10 years, in order to have validated it the appropriation should have been for the total amount that the city would have to pay to the company during the entire 10 years if it complied with its contract, to wit, the sum of \$900,000. Even though we should hold, as we have done, that the con-

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tract was not obnoxious to the constitutional provision fixing a limit of indebtedness, because the indebtedness, within the meaning of that provision, was only from year to year, counsel urge that the section of the charter which we have quoted covers the aggregate amount of the indebtedness to be incurred for the entire term of years, because the word "liability" is used in the section, and not "debt" or "indebtedness." It is insisted that the word "liability" has a much broader and more extended significance than the term "debt." This is true, and we have no dispute with or criticism of the argument of counsel to that effect, or the authorities cited by them in support of it. It is equally true, however, that the words are sometimes used interchangeably, as synonymous, and in the construction of a statute whether this is the case may be judicially determined from the context,—from the sense and connection in which it is used. The very authorities which counsel have cited in support of their position are authorities to this effect. In *Cochran v. U. S.*, 157 U. S. 296, 15 Sup. Ct. 628, 39 L. Ed. 704, the meaning of the word was determined by a consideration of the plain object of the statute. In *Salem Water Co. v. City of Salem, supra*, the inhibition of the statute extended both to "debt and liability." Both words were used, and the court because of this concluded that it was the evident intent of the Legislature in thus using both of the words to give to the language the broadest and most comprehensive significance possible, and include within the inhibition every character of liability, absolute or contingent, express or implied.

Applying these rules of construction, we feel a clear conviction that this section, as applied to contracts of this and similar character, in any event does not bear the interpretation placed upon it by either the trial court or counsel. The charter expressly empowered the city to provide for lighting the streets and public grounds. Article 2, sec. 20, subd. 8 (Sess. Laws 1893, p. 146). That it would have had such power, even without this express grant, is probable, but needs no discussion. The Legislature made the express grant of power, however, and in a matter of such absolute necessity, essential to the comfort and convenience of the citizens,

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as well as required for the protection of their lives and property, it is not to be supposed that, in a subsequent section of the same act, it would insert a provision which would, in effect, defeat the exercise of the power. As was said by the court in *Leadville Illuminating Gas Co. v. City of Leadville*, 9 Colo. App. 403, 49 Pac. 268, in passing upon a similar provision of the general law, regulating all municipal corporations excepting those organized under special charter:

"If a prior appropriation was essential to the validity of the contract, then it could not have been executed at all, for the reason that it was impossible to compute the amount which would be due during the twenty-five years, even if it had the power to make such an appropriation for such a length of time, or during any part of said time. It is unreasonable to presume that the Legislature required the performance of impossibilities, or that, having once expressly granted to a city the power of making such contracts as that in question, as it did in section 2655 (Gen. Law 1877), it then, in a succeeding section of the same act, imposed such restrictions as to practically nullify such grant of power."

In this case, as in that, if the theory of appellee be correct, it would have been impossible for the city to have entered into the contract at all, because it was powerless to have made the required appropriation. Under its charter, its appropriations must be made annually, and then only for expenses to be incurred during the current year. It could not make appropriations for such expenses to be incurred during succeeding years. Besides, it would have been impossible to have estimated the exact amount of money to be due in succeeding years. It could not then have been told how many are lights would be needed for the proper lighting of the city during any of the succeeding years. The result would be that the city could not provide for the lighting of its streets, public grounds and buildings at all, unless it should go to the heavy expense of constructing and maintaining a plant of its own, which the finances of the city might not be in a condition to permit, or unless it submitted to the terms of the one company then in existence. Even if able to have built its own arc lighting plant for street lighting purposes, it would not have secured thereby for its citizens the advantages of a commercial electric light plant or of competition.

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While it may not be authorized specifically to make any contracts for the lighting of the residences and business houses of the people, we believe that no one would have the temerity to deny that a city, in providing for public lighting within the limits and scope of its powers, would be grossly derelict in its duty if it did not use those powers, so far as possible, to advance and subserve the interest, not only of the corporation itself in its corporate capacity, but also of the people of the community in a matter of such paramount necessity as light. It is, as we have said, a matter of universal knowledge, and a fact of which all courts take judicial notice in passing upon the contracts of municipalities for light and water, that the erection of a plant for the supply of either involves large expenditure of money, and especially for cities of the size and population of Denver, and that no individual or company would undertake such an enterprise without first having a contract with the city for some term of years, so as to have some reasonable business guaranty that there would be received back from the earnings some proportion of the amount to be expended, thereby reducing the risk of the business venture. The result would therefore be, if the contention of appellee is maintained, that the grant of power to the city for this necessary and beneficial purpose would be practically nullified. It would, in effect, be saying to the municipal authorities: You may contract for the lighting of the streets, but you may not do that which is absolutely necessary to secure such a contract.

Besides, it is not necessary, in order to carry out the evident purpose, intent, and object of section 10, to give to it the construction contended for. This purpose was to prevent the squandering of the public money; and to compel municipalities to live within their means,—within the limits of a sum fixed beforehand; upon, as it is called, the “pay as you go” plan. Because of this section, they could not, after services were rendered, under improper or corrupt influences, allow extravagant and unreasonable sums for services rendered or supplies furnished, and they could not thereby exceed the revenues of the city, and create an indebtedness which experience had shown rarely diminished, but usually increased. The same object will be accomplished if it should be held, as we do,

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that the city was not required to make an appropriation in this instance for any indebtedness which might be incurred during the term of years provided for in the contract, unless it be for the first year. In other words, if the city, during the existence of this contract, in each of its annual appropriation bills, appropriates a sufficient amount of money to cover its obligations to the light company which may accrue during the year, the object of the statute, and, we believe, its letter, would be complied with. "The action of municipal corporations is to be held within the limits prescribed by statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction." *Kyle v. Malin*, 8 Ind. 37, cited with approval in *City of Pueblo v. Robinson*, 12 Colo. 598, 21 Pac. 899, and also in *Leadville Illuminating Gas Co. v. City of Leadville*, *supra*. In *McBean v. City of Fresno*, 112 Cal. 160, 44 Pac. 358, 31 L. R. A. 794, 52 Am. St. Rep. 191, the court had under consideration a contract by the city with an individual to take care and dispose of the sewage of the city for a period of five years in consideration of a certain sum per annum, to be paid quarterly. It was claimed that the contract was obnoxious to a provision of the State Constitution to the effect that no city should incur indebtedness or liability in any manner or for any purpose exceeding certain limitations. The charter of the city also provided that the trustees should not create, order, or permit to accrue any debt or liability in excess of the money in the treasury that might be legally apportioned and appropriated for the purpose. Here both in the Constitution and the city charter the words "debt" and "liability" were both used. The contract was held to be valid and effective, the court basing its views "upon the conviction that at the time of entering into the contract no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year, in separate amounts, as the work is performed." See, also, *Dallas Electric Co. v. City of*

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Dallas, 23 Tex. Civ. App. 323, 58 S. W. 153. We think the same reasoning which supports the conclusion by the courts and the weight of authority which we have discussed in the first part of this opinion, that in contracts of this character the word "debt" as used in the constitutional inhibition does not cover the aggregate amount to be paid for the entire term of years during which the contract runs, but only the amount for each annual period, applies with equal force and effect to the construction of this section of the city charter, and supports our conclusion that the word "liability" in the section does not, within the intent and meaning of the Legislature with reference to contracts of this character and nature, cover the aggregate amount to be paid under this contract for the entire term of years, but only, if the section applies at all, the amount of indebtedness or liability to be incurred during each annual period. The only reasonable conclusion is that, as applicable to contracts of this character, the word "liability" in this section has no broader significance than the word "debt." This construction allows the section to stand, and at the same time gives full force and effect to the intent and purpose of the enactment.

3. It is claimed that the city had no authority to contract for any term of years beyond one, and that ten years is an unreasonable length of time. It is true that the city was not given by the charter power to contract for lighting for any term of years, nor was it restricted or limited to any particular term. In fact, the charter did not specifically give it power to contract at all,—to enter into any contract for lighting. The specific grant of power was to provide for lighting. This was the power expressly granted, but, under all authorities, the city was authorized to exercise those powers necessarily or fairly implied in or incident to it. As a business proposition, any city, in entering into a contract of this kind, is in the exercise of its business powers. It needs no argument to demonstrate that to carry out such a power it is absolutely necessary that the city should have the power to contract,—provide terms and specifications,—and this whether it undertakes to provide for lighting by building a plant of its own or by entering into a contract or agreement with a company or individual to supply the light. There

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There are no specific restrictions upon the right of the municipality to contract in the exercise of this power, and there is no reason in such case why the city, in the exercise of its business powers, should not have the same right to contract as a natural person. Any other conclusion would be disastrous to the carrying on of the multifarious business affairs of the city, and as we have before said, it is a practical business impossibility for a city to carry out this power unless it does contract for some term of years. It has so far escaped our attention if there is a single case in the books among the vast multitude treating of contracts for lighting cities wherein the contract does not run for some term of years. As to the reasonableness of the term fixed, there being no express limit upon the power of a city as to time, the court should not undertake to interfere with the judgment of the city council, which is conversant with the needs and necessities of the city as well as existing conditions and circumstances to be considered in fixing the term of a contract, unless it is clearly made to appear that there has been an abuse of discretion. There is no showing here to support such a finding. Practically the only contention is that a 10-year term is too long because it is for 10 years. In the general statutes governing all towns and cities of the State except Denver, and possibly one town, the municipalities are authorized to contract for lighting for a term of 25 years. If this be a permissible term, we certainly see no reason why 10 years would be an unreasonable term for the city of Denver, a municipality existing in the same State, and created by the same legislative power. Our conclusions upon this branch of the subject are amply supported by authority. *Los Angeles Water Co. v. City of Los Angeles* (C. C.), 88 Fed. 733, affirmed in 177 U. S. 559, 20 Sup. Ct. 736, 44 L. Ed. 886; *Conery v. Waterworks Co.*, 41 La. Ann. 920, 7 South. 8; *Seward v. Liberty*, *supra*; *Smith v. Dedham*, *supra*; *Ludington Water Supply Co. v. City of Ludington*, *supra*; *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15; *Light, Heat & Water Co. v. City of Jackson*, 73 Miss. 598, 19 South. 771.

Irrespective of the question as to the duration of the contract, that it was not only reasonable and highly beneficial in its terms to

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the city and its inhabitants is indisputable, and clearly appears from the stipulated facts. By it the city secured the public lighting at the same rate it was then paying, being a much less rate than it had paid under contract for years previous, with a still further reduction upon all arc lights in excess of 1,000 which the future necessities of the city might require, and also a reduction in rates for light to be used by its inhabitants; also the benefits of competition between two companies; and also a stipulation by the defendant Lacombe to pay into the city treasury annually, in consideration of the privileges granted, 3 per cent. of its gross receipts from commercial lighting, heat and power.

4. We see no support whatever for the contention that the contract created, or tended to create, a monopoly. Nowhere in the contract is any exclusive right granted. Manifestly its natural tendency and immediate effect was to prevent a monopoly. In consequence of it a new lighting plant was constructed, and thereby both city and citizens were given the advantages of competition.

5. The execution of this and similar contracts is in the exercise by a municipality of its contractual, its private, proprietary, or business powers, so to speak, and not of its governmental or delegated legislative powers; hence it is, in our opinion, not liable to the charge that the execution of the contract would for the term thereof operate as a surrender of the legislative power of the city council. 1 Dill. Mun. Corp. secs. 27, 66, 68; *Cunningham v. City of Cleveland*, *supra*; *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 282, 34 L. R. A. 518; *Los Angeles Water Co. v. City of Los Angeles*, *supra*; *Seitzinger v. Illuminating Co.*, 187 Pa. 542, 41 Atl. 454. In the *City of Arkansas City* case, *supra*, it was said by the court:

"A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked (that the city council can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legisla-

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re powers of their successors, and deprive them of the unrestricted exercise of their powers, as the exigencies of the time might demand). In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation,"—citing a large number of cases.

We think this concisely and properly states the true rule.

6. It is claimed that the city council had no power to enter into the contract in question, the power to contract for public lighting being by the charter conferred upon or committed to that branch of the executive department of the city government designated as the department of public works. The duties and powers of the board of public works are set forth in section 35, art. 3, of the charter. Sess. Laws 1893, p. 167. They may be said to comprehend, generally, the exclusive management and control of the construction, reconstruction, and maintenance of all public and local improvements, including the grading, paving, etc., of streets and alleys, of sewers, sidewalks, and, among other things, the "erection of poles, stringing of wires, laying of tracks, pipes, and conduits for wires, whether done by the city, corporation or individuals." It is upon these last words that counsel base their contention. We fail to see any support for it. To the board is simply committed the power to regulate the erection of poles and the stringing of wires, because they are necessarily located in the public streets or alleys over which the board has exclusive control. We do not see how the most strained and forced construction could conclude from the language in the charter that the board has anything to do with providing for the lighting. It is true poles must be erected and wires strung before the electric fluid can be transmitted and the light secured, but this is simply an incident to the business,—one of the artificial instruments necessary to be used in common with other instruments, like the erection of the building for supplying the necessary machinery, etc. The power to provide for lighting the streets and public grounds is expressly granted to the city coun-

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cil. In order to accomplish this, the party who contracts for the lighting must make certain excavations in the street, and erect therein poles and string wires, and before he can do this the board of public works, because it has exclusive control over the streets, must designate the places where and the manner in which this work can be done, so as to restrict the character of the obstruction and the danger to life and property within as small limits as possible; but how this alone can be construed to give the board of public works power to control, manage and contract for the public lighting—a power specially granted to the city council—we utterly fail to conceive. We see nothing in the entire section defining the powers and duties of the board of public works which could, in our opinion, by any possibility, embrace the public lighting. *Electric Light & Power Co. v. City of San Bernardino*, 100 Cal. 350, 34 Pac. 819; *City of Trenton v. Shaw*, 49 N. J. Law, 638, 10 Atl. 273. However desirable and beneficial may be the lighting of the streets, it does not constitute a public improvement, confided to the care and control of the board of public works.

7. It is suggested, but not very strenuously urged, that the contract was unnecessary and excessive, hence unreasonable, because at the time when it was entered into another company, the Denver Gas & Electric Company, had then in existence, in full operation in the city, an electric lighting plant of sufficient capacity to supply the necessities of the city and the needs of its inhabitants; that it was ready and willing to furnish the lighting, and, in fact, before the final passage of the ordinance providing for the contract in question, this company made an offer in writing to supply the public lighting, provided for in the Lacombe contract, for a period of one, three, five or ten years, as the council might elect, for the price of \$60 per year per lamp, being \$30 per annum less than that provided for in the contract, and also to so amend its rates for commercial lighting that the average of its charges to private consumers should be less than a certain specified maximum amount, which we will presume was less, although the fact does not clearly appear, than the rate it had charged for commercial lighting theretofore. This offer came too late to be effective for any purpose, either in

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argument or otherwise. It appears that in March, 1900, nearly a year before the entering into of the specified contract which is here under consideration, the city council and Lacombe had entered into a contract precisely similar to, and identical in all its terms and provisions with, the one in question in this suit. In pursuance of this, Lacombe commenced work and had expended, as appears from the agreed statement of facts, a large sum of money to carry out his contract, to wit, the sum of \$300,000, and had incurred obligations for \$150,000 additional. This contract was attacked by a suit in court at the instance of some taxpayer, and claimed to be invalid because of some irregularity in the publication of the ordinance which authorized it. To avoid any question as to this alleged irregularity, the city council thought best that the ordinance should be reintroduced and re-enacted, and thereby avoid any question as to its validity. This was done in 1901, and it was while this proceeding was pending, and but a few days before the final passage of this second ordinance, that the Denver company made its offer. We think the mere statement of these facts carries with it the conviction that neither in law nor morals was the offer of the Denver company at that late date sufficient to justify the city council in rescinding, even if it had the power to do so. Waiving the question as to whether at the time of this offer the city was legally bound by the contract with Lacombe, it was unquestionably morally bound and under the highest obligations to carry its negotiations to a final and complete conclusion. Upon the faith of its agreements, Lacombe had incurred an expenditure of nearly half a million of dollars. We know of no law, and there is certainly no usage, which would approve, justify or require members of a city council acting in their representative capacity, unless in cases unlike this, where they have no discretion, in ignoring and violating the rules of business morality and probity which prevail among individuals, and which the law in every instance seeks to encourage and uphold. It appears in the stipulation of facts that prior to the passage of the ordinance of 1900 the mayor and members of the city council conferred with the manager of the Denver company with reference to a reduction in rates charged the city for electric lighting, and

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were given to understand that the company was not prepared at that time to make any reduction. It further appears as an admitted fact that since the commencement of this action, which was begun immediately upon the passage of the ordinance, the Denver company, because of and for the purpose of meeting the competition afforded by the defendant Lacombe, materially reduced its rates for commercial lighting, thereby certainly securing to the inhabitants of the city very material and substantial benefits. This, of itself, is, in our opinion, a sufficient answer to the argument that the contract in question was unnecessary.

Counsel on both sides have presented unusually able and exhaustive arguments, and to the proper solution of the questions raised we have given the most careful and thorough investigation. In our opinion, the doctrines affirmed by us in *Leadville Illuminating Gas Co. v. City of Leadville*, *supra*, are, on principle and in effect, directly applicable to and decisive of the controlling questions in this case, but we have thought proper, by reason of the importance of this case, to give them further and fuller consideration. We have not considered the objections of appellee *seriatim*, but in the course of this opinion we believe that we have touched and passed upon all. Our conclusion is that, although they are pressed with much ingenuity and ability, they are without substantial merit. The contract was, in our opinion, a valid one, and the court erred in its judgment. This conclusion finally disposes of everything in the case, so that there will be nothing to be done by the trial court in the case should it be remanded. There is no necessity therefore, for this useless procedure, and judgment will be entered here in accordance with the views which we have expressed. It will be that the injunction be dissolved, that the defendants go hence without day, and that all costs be taxed against the appellee.

Reversed, and judgment rendered for appellants.

Limitations as to municipal indebtedness.—As to constitutional limitation on indebtedness, see 1 Dillon on Mun. Corp. (4th Ed.) sec. 130; Joyce on Electric Law, secs. 264-271. The constitutions of nearly all the States prescribe a limitation upon the amount of indebtedness to be incurred by municipalities, based for the most part upon the taxable value of property

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therein. A valuable note upon the question of what constitutes municipal indebtedness within the meaning of constitutional limitations is found appended to the case of *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 229-243. We quote the following (p. 239), from this note: "It is not unusual for a city to enter into a contract for the furnishing of light or water for a designated number of years, to pay therefor either a specified sum each year, or a sum to be ascertained by a computation based upon the number of hydrants used, or lights furnished in each succeeding year. In these cases the question is, shall the aggregate sum which will become due on the contract be treated as existing indebtedness, or only the sum which falls due each year? If, when the contract is entered into, the municipality is indebted up to the constitutional limit, so that there can be no lawful addition to the existing indebtedness, the whole contract is void, and no recovery whatever can be had thereunder. (Citing *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788; *Prince v. Quinoy*, 105 Ill. 138, 44 Am. Rep. 785; *State v. Atlantic City*, 49 N. J. L. 558, 24 Atl. 962; *Burlington Water Co. v. Woodward*, 49 Iowa, 58; *Spillman v. Parkersburgh*, 35 W. Va. 605, 14 S. E. 279.) But suppose the constitutional limit of indebtedness not to have been reached when the liability was assumed, and that the sum to be paid each year may be added to the pre-existing indebtedness without passing beyond the limit, but that the aggregate sum added to such indebtedness will carry it beyond that limit, and furthermore, that the municipality has no discretion but to go on from year to year, and to incur liability for the payment of sums falling due in that year, shall the amount of such aggregate be regarded, or only the amount falling due within any one year? Where there are no means provided by the statute or ordinance for the payment of the several sums as they shall fall due, and resort must be had to the general funds of the corporation, there are many decisions to the effect that as the city is absolutely liable for the full amount which can become due under the contract or ordinance, according to the terms thereof, such amount constitutes from the beginning an existing indebtedness. (Citing, *Niles Water Works v. Niles*, 59 Mich. 311, 26 N. W. 525; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *State v. Medbery*, 7 Ohio St. 522; *Spillman v. Parkersburgh*, 35 W. Va. 605, 14 S. E. 279.) If a contract is made for the erection of water works, or for any other improvement, and the time of payment is postponed to some date or dates in the future, we apprehend that there is no conflict of decision upon the subject, and that the sums to become due in the future must all be taken into consideration in estimating the amount of the existing indebtedness of the municipality (citing *Oulbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781); but where the contract or ordinance is one intended to provide for the furnishing of a municipality with water to be used for public purposes, or with lights for the streets or other public places, and payment is to be made for such water or lights from year to year, this is but a mode of providing for the necessary current expenses of the municipal government, and while it is true the municipality has no discretion not to become liable from year to year for the amount which it has agreed to pay, yet the almost overwhelming weight of authority is that it is not to be regarded as indebtedness within the meaning of these constitutional or statu-

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tory limitations, except for the amount which has actually fallen due under the contract or ordinance, and that it must therefore be sustained, although the amount which will ultimately become due under it may greatly exceed the limit of indebtedness which the municipality is authorized to incur. (Citing *East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 417; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Grant v. City of Davenport*, 36 Iowa, 396; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. 957; *Lott v. City of Waycross*, 84 Ga. 681, 11 S. E. 558; *Merrill Railway & Light Co. v. Merrill*, 80 Wis. 358, 49 N. W. 965.)"

What constitutes a city purpose.—The lighting of the streets and public places is one of the duties devolving upon municipal government, and is a city purpose within the provisions of the constitution prohibiting the contracting of indebtedness "except for county, city, town or village purposes" (N. Y. Const., art. VIII, sec. 11), and since light in dwellings is as important and essential as upon the streets, and promotes the general comfort, safety and welfare of the inhabitants, it may, when supplied in connection with that which is furnished by the municipality, under its duty to the public, be regarded as an incident thereto and one of the purposes for which the municipality may properly contract. *Hequembourg v. City of Dunkirk*, 49 Hun, 550, 2 N. Y. Supp. 447.

Indebtedness exceeding current revenues.—In the case of *Küchli v. Minnesota Brush Elect. Co.*, 58 Minn. 418, 59 N. W. 1088, 49 Am. St. Rep. 523, it was held that if a city is prohibited from making any contract whereby liability is incurred exceeding the revenues of any fiscal year, a contract made by it for the lighting of its streets for a term of five years is void, unless the revenue on hand at the time the contract is made is sufficient to cover all the liability incurred under the contract and payable during the five years, together with the current expenses and existing liabilities for the year in which the contract is made. The statute in this case prohibited the municipality, without special authority of law, "to create any debt or any liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities." The statute under consideration in the principal case prohibited the payment of any money for any purpose whatever in excess of the amount appropriated for the current year. The purpose and intent of both these statutes is the same, but the court in the principal case arrives at a different conclusion upon the theory that a contract calling for an expenditure of a sum of money based upon the number of lights furnished in the municipality, renders it impossible to appropriate in any one year an amount sufficient to meet the necessities of the contract for succeeding years. The obligations incurred by the city under the contract necessarily vary as the number of lights is increased or diminished. The court in construing the statute has assumed that the Legislature by its prohibition as to the payment of money beyond the amount appropriated each year, did not intend to compel the city to contract for its light from year to year. As stated by the court, such a method of furnishing light could not be made economical or to the best interests of the taxpayers. If a city by its charter is authorized

to contract for the furnishing of light and water, a prohibition contained in the charter against the incurring of indebtedness beyond the amount appropriated each year for the public purpose should not be construed to prohibit a reasonable contract for light and water for a term of years. If, in the exercise of a discretionary power vested in municipal authorities, it is decided that the interests of the municipality will be best promoted by contracting with private individuals or corporations for the furnishing of light and water, it is certainly reasonable to place such a construction upon the statutory authority thus vested in municipalities as to permit the making of such contracts to extend for a reasonable length of time. It would, therefore, seem that the principal case has declared the correct principle controlling this question.

Knowledge of constitutional limitations.—Whoever deals with municipalities is bound to know all constitutional limitations placed upon their power to incur indebtedness in particular years (*Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167); and is charged with notice of the fact that the municipality is indebted to the constitutional limit. *La Porte v. Gamewell Fire Alarm & Telegraph Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; *Gamewell Fire Alarm & Telegraph Co. v. La Porte*, 96 Fed. 644. But see *Arbuckle-Ryan Co. v. City of Grand Lodge*, 122 Mich. 491, 81 N. W. 358.

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North Carolina; Supreme Court.

1. **CONTRACT FOR PUBLIC LIGHTING OF STREETS OF MUNICIPALITY.**—The charter of the town of Concord was amended by chapter 85, Laws 1903, authorizing the board of aldermen of the city to provide for lighting the streets and public buildings of such city, and to contract and pay for the same. At the same session another act was passed, providing that whenever twenty citizens of such city shall apply to the board of aldermen by written petition it shall be the duty of the board to provide for an election to vote upon the question as to whether a contract for furnishing lights to the city should be executed; under such act the period of the contract could not exceed twenty years. The municipality entered into a contract for the lighting of the streets without an election as so authorized. Such contract was held invalid, since the two acts referred to should be construed together, and without submission of a proposition to the voters of the city, no such contract could be executed.

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2. VALIDITY OF ACT AUTHORIZING CITY TO CONTRACT FOR STREET LIGHTING.—

An act authorizing the municipal authorities of the city of Concord (Private Laws 1903, ch. 86, p. 146), upon a submission of a question to the voters of a city, to contract for public lighting, is within the powers and duties of the Legislature, as prescribed by article 8, section 4, of the Constitution.

Appeal by defendant from judgment for plaintiff. Decided December 8, 1903; reported 133 S. C. 587, 45 S. E. 948.

Montgomery & Crowell, Burwell & Cansler, and W. M. Smith,
for appellants.

L. T. Hartsell, for appellee.

Opinion by CONNOR, J.:

The General Assembly of 1903 (chapter 85, p. 140, Priv. Laws) amended the charter of the town of Concord. By section 5 of said act it is provided "that the commissioners or board of aldermen of said city shall have the power, and it shall be their duty, to provide for lighting the streets and public buildings of said city and to contract for and pay for the same." At the same session (Priv. Laws, p. 146, ch. 86) we find an act entitled "An act to authorize the commissioners for the town of Concord to contract for lights for said town." It is provided that whenever 20 citizens of said town shall apply to the commissioners by a written petition, asking the commissioners to light the streets and public buildings, it shall be the duty of the said commissioners to order an election to be held in said town, at which election those in favor of lights shall vote a ticket on which shall be written or printed the word "Light," and those opposed shall vote a ticket on which shall be written or printed the word "Darkness." If a majority shall vote "Light," then said commissioners shall have full power and authority to contract for such lights in such quantities and upon such terms as said commissioners may deem for the best interest of said town for a period not exceeding 20 years, or said commissioners shall have the right to erect or purchase a plant for lighting said town, and operate the same. It is further provided that, if a majority of

said citizens shall vote for lights, the commissioners may levy a tax to pay for the same. No limit is fixed to the rate or amount of such tax, except that it shall be sufficient to pay "regularly and promptly for said lights." These statutes were ratified on the 16th of February, 1903. On November —, 1902, the defendant entered into a contract with Thomas A. Scott and his associates for the purpose of lighting the said streets, the terms of which are fully set out in the record, which was to run for the term of 18 years, and which conferred upon the said Scott and his associates a franchise for 25 years for commercial and domestic lighting. No petition was ever filed and no election ever held pursuant to chapter 86 of said Acts. We do not deem it necessary to set forth more fully the terms of the contract.

The sixth allegation of the answer, filed the 25th of March, 1903, recites a resolution referring to the act of 1903, p. 140, ch. 85, and reciting: "Whereas, the town of Concord has a population of about ten thousand people, many hundreds of whom work in the mills between sundown and sunrise, and has about thirty miles of public streets, and a lot of public buildings; and, whereas, it is not only the sense of the board of commissioners for the town of Concord that it is a necessary expense of said town to light the streets and its public buildings, but the Legislature now in session has given the city power to provide for lighting the streets and public buildings of said city, and to contract for and pay for the same: Now, whereas, the contract heretofore entered into with Thomas A. Scott and Reuben Burton is fair, just and equitable, and to the best interest of said town: Therefore, be it resolved by the commissioners for the town of Concord that said contract with Thomas A. Scott and Reuben Burton be, and the same is hereby, in all respects, confirmed."

In view of the answer and the legislation in respect to the town of Concord prior to February 16, 1903, it would seem that whatever validity this contract has is by virtue of the two acts hereinbefore referred to. This is evidently the view of the defendant. Certainly, if the contract was incomplete prior to February 1, 1903, the attempt to confirm it without complying with chapter 86, p.

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146, Priv. Laws 1903, could have no other or further effect than if it had been originally made at that time. No explanation is given in the answer why this contract was not submitted to a vote of the people pursuant to chapter 86, p. 146, of the Private Laws of 1903. As we have seen, the act authorized and directed this course to be pursued upon the petition of 20 citizens, and it would have required but a short time to have submitted it to the voters, and thereby removed all questions in regard to its validity.

This action is brought by the plaintiff, a citizen and taxpayer, for the purpose of enjoining the town from entering into said contract. A number of interesting questions were discussed before us upon the argument and in the briefs respecting the right of a town to enter into a contract of this character for the purpose of furnishing lights as a "necessary expense." Whatever views we may entertain upon that question, we are of the opinion that the power of the commissioners to enter into a contract for lighting the said streets is prescribed by, and restricted to the provisions of chapter 86, p. 146, Priv. Laws 1903. The two statutes should be read together; and, thus read, they make it the duty of the commissioners, and empower them, to provide for lighting the streets, and to contract and pay for the same, when empowered so to do in the manner pointed out in the statute. It may be that by a proper construction of the charter the power is conferred to provide lights and pay for the same out of the ordinary revenues of the town, but, if the citizens wish a more extended or permanent system for lighting the town, requiring the levy of a special tax, they may confer upon the commissioners the power to make the contract, not exceeding 20 years. It would seem clear that it was the purpose of the Legislature to restrict the power to make such contract by the terms of chapter 86; otherwise this act, which was evidently passed as a companion to the act amending the charter (chapter 85), would be of no effect. "Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the

corporation." Dillon, Mun. Corp. sec. 449. In *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96, FIELD, C. J., says: "The mode in such cases constitutes the power. . . . Aside from the mode designated there is want of all power." The court in *Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136, says: "It is a general principle of the law that the specific designation of the manner of exercising a power operates as a limitation upon the general power conferred." The Code of Iowa conferred upon cities the general power to make regulations against danger from accident by fire, and to establish fire districts, and, on petition of the owners of two-thirds of the grounds included in any square, to prohibit the construction of wooden buildings, etc. It was held that an ordinance prohibiting wooden buildings within such squares, passed without the petition of the requisite number of property owners, was void. "Where a thing is directed to be done through certain means or in a particular manner, there is implied an inhibition upon doing it through any other means or in a different manner." *Keokuk v. Scroggs*, 39 Iowa, 447. A statute authorized the council of Pittsburg to grade, on the application of a majority of the lot holders of the street, and to assess the cost, etc. It was held by the Supreme Court of Pennsylvania (SHARSWOOD, J.) that "without such application the city had no power or jurisdiction in the premises." *Pittsburg v. Walter*, 69 Pa. 365. In *Swift v. Williamsburg*, 24 Barb. 427, the plaintiff having performed services for the city upon a contract made in the absence of a compliance with the statute requiring a petition by the requisite number of citizens, the court says:

"If plaintiff can recover on the state of facts he has stated in his complaint, the restrictions and limitations which the Legislature sought to impose upon the powers of the common council go for nothing. And yet these provisions are matters of substance, and were designed to be of some service to the constituents of the common council." "It is an elementary principle of construction that charters of corporations conferring powers are to be construed strictly." Cooley, Const. Lim. 232.

It does not appear why, with this act in full force and effect, the commissioners entered into the contract in controversy without

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consulting, or having the approval of, the citizens of the town. With this, of course, we have nothing to do. It is ours to construe and declare the law. The passage of chapter 86 is strictly within the power and duty of the Legislature, as prescribed by article 8, section 4, of the Constitution:

"It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

Whether providing lights for the city is a necessary expense is an interesting question. It has been discussed and considered by this court in *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427. We are of the opinion that, when it is made the duty of the commissioners to provide lights, it is at least a legislative construction of the Constitution that it is a necessary expense. To what extent they may incur debts or make contracts for a long term is a delicate and important question, not necessary to be decided in this case. It is within the province of the Legislature to prescribe the terms and conditions upon which municipal corporations may enter into such contracts. It is held by many respectable courts that the power to make such contracts is unlimited as to time. There are other authorities to the contrary. The question is of much importance to the citizens of this State, and deserves the careful consideration of the legislative department of the government.

We think that, for the reasons hereinbefore set out, the judgment of his honor should be affirmed.

CLARK, C. J. (concurring in result):

The mayor and commissioners of the town of Concord in November, 1902, entered into a contract with Scott & Burton for lighting the public buildings and streets of said town with electricity for the term of 18 years from June 1, 1903. The town has been lighted by electricity for the last 13 years, the current contract not expiring till June 1, 1903. This is an action brought

by a citizen and taxpayer to restrain the town authorities from paying out any money under said new contract, on the ground that the town had no power to make such contract without having first obtained the consent and approval of a majority of the qualified voters of said town, which had not been done. The judge, being of opinion with the plaintiff, granted an injunction till the hearing, and the defendant appealed.

A taxpayer can bring such action. *Flynn v. Electric Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; 2 Dillon, Mun. Corp. secs. 914-922; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

Furnishing light and water for public purposes is in this day and time "a necessary purpose," and has been so recognized. *Gas Co. v. Raleigh*, 75 N. C. 274; *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479; *Croswell*, Electricity, sec. 190; *Crawfordsville v. Braden* (Ind.), 30 Am. St. Rep. 214, and notes; *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; Opinion of Justices, 150 Mass. 592, 23 N. E. 850, 6 L. R. A. 842; *Rushville v. Rushville* (Ind.), 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558; 1 Dillon, Mun. Corp. (4th Ed.) sec. 3A, and other cases cited; *Mayo v. Commissioners*, 122 N. C., at page 25, 29 S. E. 348, 40 L. R. A. 163. *Mayo v. Commissioners*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163, is only a precedent that the erection by a city of an electric light plant is not a public necessity, but that point is not presented in this case, and it is not necessary that we shall pass upon it. *Edgerton v. Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 44, is the only case in which it has been held (and there by a divided court) that furnishing a town or city with a supply of water is not a necessary expense, and upon fuller consideration we must overrule it. All the towns in the State, of sufficient size, have, notwithstanding that decision, continuously down to the present, continued to furnish light and

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water for public purposes; and the validity of such contracts, even to the extent of conferring a right of action for breach thereof upon beneficiaries, though not parties to the contract, was upheld in *Gorroll v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. In that case there was an act of the Legislature authorizing the contract, but it does not appear that the matter was submitted to a vote of the people, which would have been indispensable if furnishing water had not been "a necessary expense." Const., art. 7, sec. 7.

Furnishing light and water, for public purposes, at least, being a necessary expense, the only question remaining is, for what period are the municipal authorities authorized to so contract? Can they contract for any period, however long? Can they contract for 100 years, or 18 years, as here, or for 10 years, and thus tie the town down for long years to a system which in the rapid march of improvement may become antiquated, or be superseded by the invention of a far better or a far cheaper system, or which may become unfitted to the proportions which a growing town may soon attain? The courts, in the latter cases, oppressed with the force of this objection, have laid down the principle that the length of time must be "reasonable." This is objectionable unless there is a rule to determine what is reasonable; otherwise, it will leave the decision of reasonable time in each instance to the views of the particular judge or court which tries the case—the rule of "the chancellor's thumb."

Besides, if the town authorities have power to make the contract at all, they, and not the court, are to judge of the extent of the exercise of power confided to them (*Broadnax v. Groom*, 64 N. C. 644), in the absence, always, of course, of fraud, which is not charged here. Yet there must be some restriction, *ex necessitate*, in the duration of such contracts. Certainly the most logical one is this: That inasmuch as the town authorities are elected for a specified, fixed term, to furnish, among their other duties, those things which are necessary expenses for the town, the authority of the commissioners to contract for such necessities is restricted to the time for which they have been chosen

by the people to discharge that duty, *i. e.*, for their term of office, and they cannot make a valid contract for such purpose beyond the term for which they have been authorized to act in supplying such necessary things. Certainly this is a safe rule, free from the fluctuations and arbitrariness incident to the doctrine of "reasonable duration," unless the term of office is reasonable time; and this court is as fully empowered to establish this rule by way of precedent as the courts which have created the rule which subjects the length of every contract to be "validated" by a lawsuit. Under that system, no contract is certainly valid unless passed upon by litigation instituted for that purpose.

It is true, it is argued in this case that no contractor will go to the expense of establishing a light plant for a short-term contract. This is merely the argument *ab inconvenienti*, and would make it a matter of consideration not between the town authorities (elected by the people thereof) and the contractor, but between a court (not acquainted with the needs of the town and attendant circumstances) and the contractor, how short a term the latter can be induced to take. Furthermore, if the contractor is not willing to take a contract for two years (the term of office), with the opportunity to furnish private consumers, and trust to the reasonableness of his prices, and the advantages of already having a plant, to procure a renewal from the board successively elected each two years, then it is open to the town either to establish its own light and water plant, as most progressive towns are doing, or the desired contract can be submitted to the qualified voters upon legislative authority, to make a contract for such period as the popular voice may ratify at the ballot box. It is always a sound policy to consult the will of the taxpayers upon an expenditure of this importance, especially when the engagement is to extend some years into the future.

"It may now be taken as well settled by this court that water and light are not in themselves such necessary expenses of the town as to authorize an unusual levy of tax, or the incurring of a debt without proper legislative authority and the approval of a popular vote." *Thrifty v. Elizabeth City*, 122 N. C. 31, 30 S. E.

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349, 44 L. R. A. 427. That authority is exactly in point, and we have none to the contrary. In that case a contract to supply the town with water for 30 years was held invalid; the court saying, through DOUGLAS, J., that "there is no difference between making a contract binding a municipality for a long period of years, requiring the payment of a large yearly sum, and the issuance of bonds of the municipality to run a like period." The view herein expressed, that furnishing water and light for public purposes is a necessary expense, but restricting the power of the town commissioners to contract to the term of their office, in the absence of special authorization by a vote of the people to contract for a longer period, reconciles and puts in perfect accord the proposition laid down in *Thrift v. Elizabeth City*, *supra*, with the ruling of the court, stated by the same learned judge, in *Smith v. Goldsboro*, 121 N. C., at page 352, 28 S. E. 479, as follows: "The city provides for its citizens electric lights and water, as it is its duty to do. . . . The defendant has taken possession of said street in order that it may perform its duty to its citizens, and furnish water and lights to the owners of said lots." It is not the duty of the town commissioners to furnish water and lights longer than the period for which they have been elected to do that duty. And in the absence of a special authorization by popular vote, they have no power to go beyond their term of office, and, by a contract extending beyond their term, provide for future years, and thus tie the hands of their successors, who may be able, by their better judgment, or by reason of the progress of invention, to furnish the public with necessities by a better or more economical method.

In this state of the law, those desiring profitable contracts will not be tempted (as in some cities) to spend money to elect a temporary board to make contracts pillaging the taxpayers for a long period of years. They can only get long contracts from the people at the ballot box, with full discussion and publicity. Already, in these last few months, a well-known discovery promises, with good reason, to reduce electric lighting to one-eighth of its present cost. If it were a question, therefore, for the courts to pass upon—the

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"reasonableness" of time and prices of a contract by a municipality—could this contract for 18 years, and \$85 per year for 1,200 candle power light, be held reasonable?

We come to the same conclusion as his honor—though for a somewhat different reason—that the contract to furnish the town with electric lights for 18 years is invalid. Section 5, p. 141, ch. 85, Priv. Laws 1903, authorizing the town commissioners of Concord "to provide for lighting the streets and public buildings of the city, and to contract and pay for the same," does not affect what is said above, for such power was already in them, but not to be exercised beyond their term of office, unless submitted to a vote of the people, since it cannot be "a necessary expense" to bind the town now to the rates and terms of the proposed contract "for a long period of years." *Thrift v. Elizabeth City, supra*. Indeed, the act of 1903 does not contain any words attempting to confer upon the commissioners such authority. It merely gives them the ordinary right to provide for lights, which, as we have seen, means the right to contract for lighting for such a period as it is their duty to furnish lights. But whether this act may not authorize the establishment of a municipal plant as a present "necessary expense," and not a continuing expense, like the power to build a town jail or guardhouse (*McLin v. Newbern*, 70 N. C. 12), or to erect a city hospital (*Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766), or like a county building a courthouse (*Vaughn v. Com'rs*, 117 N. C. 429, 23 S. E. 354), and as is held as to an electric light plant in *Light Co. v. Jacksonville* (Fla.), 18 South. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24, and in *Mitchell v. Negaunee* (Mich.), 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468, is, as we have already stated, a matter which is not before us.

The views above expressed will not invalidate any contract for necessary expenditures during the term of office of any board of commissioners who have made such contract, nor during the term of any board which has ratified or recognized and acted upon such contract; but at the end of the current term of such board the contract will not be binding on their successors, unless ratified or

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recognized by them, except, of course, in those cases in which a contract for a longer term has been authorized by popular vote.

Where a contract for lighting, water, and the like, is to be made, it is for the public protection that it shall not be binding for a longer time than the duration of the powers of the temporary agents, the town commissioners. To be binding beyond that term, the people can and should be consulted at the ballot box, as in the recent struggle for good government in Chicago over the granting of franchises for street cars. The assumption of authority by the board of aldermen to contract, without a vote of the people, beyond their term, has elsewhere led to untold corruption; and we should be warned against opening the door here by precedent, though there is no intimation of fraud in this case. All the courts now hold that the power of the town authorities to contract must be restricted to "a reasonable time." Instead of a contest in the courts in each case as to what is a reasonable time, to the detriment of contractors as well as the town, a reasonable time is the term of office of the town authorities, since within that time, if a longer contract is desirable, the matter can be submitted to the people at the ballot box. They, and not the courts, are the tribunal to determine what is such reasonable time for which they are to be bound. When, however, a contract has already been made beyond such "reasonable time," the contract is not void, but voidable. The courts have held in such cases that for the time the contract has been executed the town must pay for what it has received thereunder. *Carlyle Water Co. v. Carlyle*, 31 Ill. App. 325; *E. St. Louis v. Gaslight Co.*, 98 Ill. 415, 38 Am. St. Rep. 97. As to the executory part, the authorities then in office can ratify it for their term; but, as to the part beyond their term, the people not having elected the commissioners to represent them beyond such term of office, such contract can only be made subject to approval at the ballot box. One Legislature cannot bind a succeeding one by a legislative contract enforceable at law; nor can one board of town representatives bind its successors. 1 Dill. Mun. Corp. (4th Ed.), sec. 97. There were authorities, before the abuses of contracting by town authorities were so well known or

had become so unpleasantly notorious, that they could make contracts extending beyond their terms of office. "The evil that men do lives after them." The more recent authorities are that such contracts are only valid if of "reasonable duration," though, of course, compensation even in such case is recoverable for the executed part of the contract. The better reason, and the evident intent of constitutional provisions in several recent constitutions, is that such "reasonable time" is the term of office of the officials acting on the contract; and, if a longer time is desirable, the matter should be referred to popular vote, as can be so readily done. Our towns and cities should have this protection, especially in view of the present and prospective growth of municipal indebtedness, which bids fair to outstrip even their growth in population. This view conflicts with none of our precedents, will safeguard our towns and cities from improper debts, often fraudulently made according to experience elsewhere, and will in no wise hamper municipal administration, seeing that ordinary supplies and requirements need not be contracted for longer than two years, the term of office. Of course, the General Assembly can, by general statute applicable to all municipal corporations, or by special statutes applicable only to the town or towns named, authorize the boards of town commissioners to contract for a specified length of time beyond their terms of office; and they will then be elected by their respective constituencies with knowledge on the part of the electorate that such officials can bind the municipality for such length of time for necessities to be furnished, even after they shall go out of office. But as the law now stands there is no such statute, and the power of the municipal boards to bind the municipality by their contracts expires with their power of attorney—their term of office—leaving the town to be bound thereafter only by the ratification, express or implied, of such contract by the newly elected board. If this were not so, it would follow that a town board could bind the town for contracts far into the future, to furnish water, lights, and other necessities, at high figures, perhaps, while, under *Mayo v. Commissioners*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163, they are disabled to contract

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for a water or light plant for which the municipality would receive at once property in hand in return for its cash or bonds. Such practical result would afford opportunity to prevent for a long time the acquisition of water and light plants by any town boards, forestalling public opinion where it might be in favor of municipal ownership, and would offer opportunity for palpable abuses. I do not think such is now the law, but that, in the absence of a statute giving them such power, the town boards of commissioners cannot bind the municipalities beyond the terms for which they are elected and empowered to act as municipal agents.

In the present case the judgment should, in any view, be modified so as to dissolve the injunction during the current term of the commissioners, but for the fact that the contract, by its terms, was not even to begin till June 1, 1903, after their term of office ended, and has never had any validity. Water and lights are necessary expenses during the term of the town commissioners or aldermen whose duty it is to furnish them, but they are not necessary expenses which such authorities must or can incur for their successors in office, unless authorized thereto by a vote of the people.

DOUGLAS, J. (concurring):

I fully agree with the opinion of CLARK, C. J., that while water and light are not in themselves such necessary expenses of the town as to authorize an unusual levy of tax or the incurring of a debt without proper legislative authority, and the approval of a popular vote, they are proper subjects of expense to be provided by the municipal authorities out of the current revenues of the town. In fact, I think it is the duty of the board of aldermen to provide them to the fullest practicable extent without overstepping the constitutional provision. As this duty is incidental to their tenure of office, it is logically coterminous therewith. In common with all other duties, it begins with their induction into office, and ends with the expiration of their term. This seems to me the only solution of the matter that is capable of practical application. My views are so fully expressed in *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479, and *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427—in both cases speaking for a unani-

mous court—that but little remains for me to say. I now realize more fully than ever before the absolute necessity of standing by the doctrines laid down in those opinions, and of throwing around the honest taxpayer the fullest protection of the law. Even under the strict construction placed by this court upon municipal powers, many of our cities and towns, especially those of most rapid growth, are assuming pecuniary burdens that must prove most onerous in less prosperous times. With many of its richest citizens having legal residence on their farms or some other out of the way place, and its largest corporations operating under foreign charters, the average city taxpayer already bears a burden out of proportion of his share of the common benefit. Let us not add to it by letting down the bars that the Constitution has erected for his protection. Let us give at least some voice in incurring the debt to him who will be called upon to pay the debt. I am aware of the vexed problems that confront us, and the difficulty of their solution; but they must be met by giving the fullest protection to the citizen, without unnecessarily hampering municipal officers in the legitimate discharge of their duties. In *Thrift v. Elizabeth City*, *supra*, this court says on page 34, 122 N. C., and page 350, 30 S. E., 44 L. R. A. 427: “We see no substantial difference between issuing bonds to run for 30 years, and the making of a binding contract for the same period, requiring the town to pay a large yearly sum, which cannot be reduced, but which may be greatly enlarged.” In the light of a larger experience and maturer judgment, I think there is a difference, and that decidedly in favor of the bonds. If a city issues its bonds, and buys its water works or light plant, it has something of value that will become more valuable with its increase in population; while, on the other hand, if the city pays rent, its rental will necessarily increase with its increased consumption. The entire trend of modern authority is to restrict all municipal contracts to a reasonable duration, and, realizing the shifting scale of judicial discretion, I am in favor of some definite rule, not only for our own guidance, but for that of the general public. That which seems most logical in its nature and practical in its application is to restrict such contracts to the official terms of those by whom they are made.

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REASONABLENESS OF CONTRACT.

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Wisconsin; Supreme Court.

1. REASONABLENESS OF CONTRACT OF MUNICIPALITY FOR ELECTRIC LIGHT.—

The rule is that courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable. So, where a municipality granted a franchise to a corporation authorizing it to construct and maintain its plant and system, and all necessary equipment and appliances for manufacturing gas and electricity, and selling and distributing the same to the municipality and its citizens, and to that end to enter upon all streets and public grounds for an absolute term of thirty years; and in consideration of certain obligations incurred by the corporation contracted and agreed to pay an amount from 30 to 50 per cent. in excess of that paid for similar services in other places; which contract was to continue for a period of thirty years, to be extended for a further period of twenty years in case the municipality failed to negotiate for the purchase of the system within a period of four months prior to the expiration of the period of thirty years; it was held that the contract entered into by the municipality with the corporation was unreasonable, and, therefore, void. The unreasonable character of such contract was emphasized by the fact that the municipality was in fact a part of the urban development of the city of Milwaukee, although outside its limits, and that its proximity to such city was such that speedy extension to it of the gas and electrical facilities existing in the city was beyond reasonable doubt.

The fact that the ordinance under which the contract was executed was approved by a certain number of the electors of the municipality does not affect its validity, if such ordinance is unreasonable.

Appeal by plaintiff from a judgment for defendants. Decided November 17, 1903; reported 97 N. W. 203.

Statement of facts by DODGE, J.:

The village of West Allis was incorporated June 30, 1902, out of what was formerly agricultural territory taken from the towns of Greenfield and Wauwatosa, and from one to two miles west of the limits of the city of Milwaukee, where had just been located several large manufacturing plants, which had drawn to themselves a considerable settlement, so that by February, 1903, the

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population amounted to about 1,800. After certain preliminary steps, including an attempted advertisement for proposals and a special election, the village board enacted an ordinance conferring certain franchises upon, and entering into contract with, the Northwestern Heat, Light & Power Company, a corporation. That ordinance first conferred upon the company, for the absolute term of thirty years, permission to construct and maintain plant, system, and all necessary equipment and appliances for manufacturing gas and electricity, and selling, furnishing and distributing to the village and its citizens heat, light and power by means of electricity, gas, oil, naphtha, gasoline and acetylene, from plants either within or without the village, and to that end to enter upon all streets and public grounds and use the same for the purpose of conducting, constructing, maintaining, repairing, enlarging, extending and operating its plants, systems and business, and generally for the distribution of the authorized light and power; to use any conductors, conduits, etc., of the village, or of any other person or corporation then or thereafter placed in the village, by paying reasonable compensation therefor. The ordinance further provided that, as the village was not at present lighted with gas, the company was given the exclusive right to manufacture and sell gas for light, and lay gas pipes within said village, for a period of fifteen years from the date of the ordinance. It was further declared "that all of the rights, permission and authority given and granted in this ordinance shall be limited in every respect to the right of said village board so to give and grant in each case." The only provisions in the ordinance regulating the manner of conducting the grantee's business was the following: "All of the company's posts, poles, wires and other appliances and equipments shall be reasonably strong and shall be placed, and excavations shall be made in such a manner as not to unreasonably impede public travel in public places, and all public places shall be left in otherwise as good condition as at the time of the commencement of the work done at the places in question; and subject to such rights of such village, as it cannot waive, to make reasonable ordinances, rules and regulations in connection with the exercise and enjoyment of such rights, permission and authority." The company bound itself to sell and furnish and keep supplied said village, citizens, persons and institutions with light "by said six mentioned means, and any, either or all of them, as hereinafter provided, but with gas and electric light only upon and along those parts of the highways where gas mains are laid at the time or poles erected and wires strung for the conveyance of electricity, respectively, and to the premises adjoining the highways at such places." No provision was made requiring the company to lay mains or erect poles and wires, except that "the construction of said plant or system or active work in furnishing such heat, light and power as provided herein, shall be begun within five months from the date of the acceptance of this ordinance by such company; and if such construction or active work is not begun within such five months, then this ordinance shall be null and void."

The village, in consideration of such obligations by the company, contracted and agreed to pay it for light, and also permitted the charge for

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private lights at rates specified, to wit: \$120 a year for each 1,600 candle power arc light, up to 50, and upon a sliding scale in case of larger number, extending to \$95 per year if more than 500 such lights were used; for gas street lamps, nominally 17 candle power, at works, \$36 a year for each light; for oil, naphtha and gasoline street lights, "of usual strength in such cases," \$45 a year for each light; and for incandescent electric lights, nominally 16 or 32 candle power, 20 cents per 1,000 watts, meter measurement. A deduction of 10 per cent. for said various prices to be made in case lights burned only till 12 o'clock, and none but *pro rata* deductions to be made for outage of any street lights. The charge for gas, other than street lights, to be at \$1.50 per 1,000 cubic feet, with a discount of 20 cents for prompt payment. The company was given power to make regulations as to the method of application by private consumers, the installation and reading of meters, collections, deposits of security by consumers, and "such other and further usual and customary rules and regulations as to its laying pipes, gas-fitting, wiring, inspection by the company, and the like, as may be necessary or convenient in conducting its said business and protecting itself against loss, as long as the same shall be reasonable, not contrary to law and not beyond the power of said village to permit. Said village shall pass all needful lawful ordinances for the protection of said lighting system." The village bound itself to all these requirements for the term of thirty years, and that during that period it would use continuously not less than twenty-five all-night electric arc lights, five naphtha lights, five incandescent lights, and "all other lights used by said village for public purposes during said thirty years shall be purchased by said village from said company." It was further provided that, at any time during the four months immediately preceding the expiration of the thirty years, the village should have the option to purchase from the company the said lighting plant and system, upon giving written notice within such four months of the intention so to do, at a price to be agreed upon, and, if a price cannot be agreed upon, then one to be fixed by arbitrators, one to be selected by the village, one by the company, and the third by the two thus selected. "If said village or municipality shall fail during said four months to purchase as aforesaid, then the rights, permission and authority and the contract features of this ordinance . . . shall be deemed extended and shall continue to remain in full force and effect for a further term of twenty years, under the same terms and conditions, except in this: That the said company shall, as a further consideration for such extensions, make a general 10 per cent. reduction of the rate to said village from said company, in force during the first fifteen years from the date hereof, for gas, electricity, oil, naphtha, gasoline and acetylene, as sold to said village." The company was to give a penal bond of \$5,000 for faithful compliance on its part with the terms of the ordinance. Such ordinance, upon signature by the president and clerk of the village and by the company, was to become a contract. It was so signed on or about February 16, 1903.

The plaintiffs and appellants, describing themselves as residents and taxpayers of the village, brought this action on the 24th day of February, 1903,

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praying that the contract embodied in said ordinance be adjudged void, and that the village, its officers, and the company be enjoined from carrying out the same, or creating any liability against the village, or making any payment under it. The case was tried to the court without a jury, and a so-called "finding" filed, declaring, first, that the allegations of the complaint, except so far as admitted by the answers of the defendants, are not sustained by the evidence; and, second, that the allegations of the answers of said defendants are substantially correct and true; whereupon judgment was rendered dismissing the complaint, from which the plaintiffs bring this appeal.

Edgar L. Wood (Quarles, Spence & Quarles, of counsel), for appellants.

Winkler, Flanders, Smith, Bottum & Vilas, for respondents.

Opinion of DODGE, J.:

It is perfectly well settled in this State, as in most others, that municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the Legislature. True, that discretion must and will be accorded broad scope and great deference. The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of courts. Nevertheless the delegation of legislative power to subordinate political divisions of the State is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized, and invalid, acts which are wholly unreasonable. *Hayes v. Appleton*, 24 Wis. 542; *Barling v. West*, 29 Wis. 307, 315, 9 Am. Rep. 576; *Clason v. Milwaukee*, 30 Wis. 316; *Cook v. Racine*, 49 Wis. 243, 5 N. W. 352; *Atkinson v. Transportation Co.*, 60 Wis. 141, 160, 18 N. W. 764, 50 Am. St. Rep. 352; *Stafford v. Railway*, 110 Wis. 331, 351, 85 N. W. 1036; *State ex rel. v. Sheboygan*, 111 Wis. 23, 37, 86 N. W. 657; *Hurley W. Co. v. Vaughn*, 115 Wis. 470, 476, 91 N. W.

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971; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Hall v. Cedar Rapids*, 115 Iowa, 199, 88 N. W. 448; *Flynn v. Water Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *State ex rel. v. Cincinnati Gas, etc., Co.*, 18 Ohio St. 262, 301; *Chicago v. Rumpff*, 45 Ill. 90, 96, 92 Am. Dec. 196; *Davenport v. Kleinschmidt*, 6 Mont. 502, 533, 13 Pac. 249; *Lamar v. Weidman*, 57 Mo. App. 507, 510; *Dillon*, Mun. Corp. secs. 97, 311, 443.

The ordinance before us is assailed as thus unreasonable. Most prominent among the elements claimed to render it so is the extraordinary term, of thirty years certainly and fifty years contingently, through which the village and its municipal successors are bound under its terms to take all its lights from this company and pay for them at rates now definitely fixed. That a term of thirty years in a contract for water supply is not under all circumstances sufficient alone to invalidate the contract as unreasonable is a proposition now settled. *Oconto W. Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113; *Hurley W. Co. v. Vaughn*, 115 Wis. 470, 91 N. W. 971. This is the extent, however, to which this court has gone, and thirty-one years seems to be the longest period sustained in any cited case. *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981. On the other hand, much shorter terms of contract, either for other service than water supply or complicated by other elements, have been held unreasonable. The considerations which in the *Oconto case*, *supra*, were deemed sufficient to warrant a 30-year contract for water, namely, magnitude of investment and time required to develop private consumption to the profit-producing point, apply, though in less degree, to a gas lighting contract, in greatly diminished degree to the supply of electric lights, but hardly at all to supply of naphtha or oil street lights, where no outlay for plant is required. Hence a term of contract for any of these forms of lighting might well be unreasonable, though sustainable in a water-supply contract. Further, we cannot deem the contract period in the present ordinance other than fifty years. The contingency upon which the village may limit it to thirty years is so restricted as to be hardly worthy of mention. The practical possibility of securing municipal action or effecting fiscal

arrangements during a four months period, not to occur till thirty years hence, is slight. The opportunity for the company to refuse to agree on price, and to render practically ineffectual the provisions for arbitration by selecting as its member of the board one who may refuse assent to any impartial third member, is obvious. A further very obvious and cogent consideration consists in the difference between the situation of West Allis and that of either Ôconto or Hurley. Both the latter were, and were likely to remain, individual and independent communities, with no opportunity to obtain water or light from plants established elsewhere, and with prospects of but normal municipal growth and development. West Allis was in practical effect a part of the urban development of Milwaukee, though outside its limits. Its existence was due to the already accomplished fact of the location of vast factories as part of the business and manufacturing aggregation pertaining to the metropolis. Its streets were laid out in continuation and extension of the system already existing in Milwaukee. The electric street car lines of that city already traversed the new village. Its proximity was such that speedy extension to it of the gas and electrical facilities existing in the city was beyond reasonable doubt. Yet further, the Legislature has established, as to cities, ten years as the limit permissible for lighting contracts. Sections 925-52, subd. 34, Rev. St. 1898. The evidence made apparent that West Allis, at the time of this contract, had already attained population more than sufficient to make it a city *ipso facto*, though that fact could not be effectively established until a State census should be taken. Section 925g, Rev. St. 1898. While legally a village, so that the absolute legislative limitation on cities did not apply, yet obviously all the reasons which induced such legislative limit are cogent as reasons why it ought not to be exceeded by this village. All these distinctions render it obvious that the two Wisconsin cases above cited can have no controlling effect as to the reasonableness of the time limit in this contract, even if that were the only extraordinary element therein. That a 50-year term, even for gas lighting, is extraordinary and far in excess of any sustained by authority, we

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have already said; also that the situation was such as to make specially unnecessary any extraordinary and special provision for lighting plant; but whether any mere length of time alone must force conclusion of unreason we need not decide; that element is certainly one which, with others, must have effect, though insufficient alone. One such additional element was the price agreed to be paid throughout the term. Without going into detail of the evidence, it is apparent that such prices considerably exceeded those elsewhere paid under substantially similar circumstances; electric arc lights by 30 per cent. to 50 per cent., gas lights by 25 per cent., and gasoline lights by 75 per cent. These excessive prices for so long a term were rendered the more unreasonable by the probability, already mentioned, that the gas and electric lighting facilities of Milwaukee would speedily be extended to this village, with prices lower than those with which the above comparisons are made. Also, it is striking that the greatest excess in price was upon the gasoline lights, with which the village might in the main be forced to content itself at the will of the company, as we shall presently demonstrate. These, of course, might be supplied by any one without large preliminary investment, and present none of the reasons for long-term contract or large price which might be urged in favor of gas or electric lighting, for which expensive plant must be provided. Not the least striking characteristic of this ordinance is its omission of all the ordinary reservations to the village of power to control the manner of its performance in those respects in which time and circumstances must make wise provision in advance impossible; also the absence of any binding contract on the part of the company to furnish lights of the kinds and at places which public welfare may demand. The only reservation of any power of control in the village is of "such rights as it cannot waive" to make ordinances and regulations. This is, of course, a most extraordinary provision, utterly needless and meaningless in a contract, and no adequate substitute for those reservations usually so industriously made in franchises and contracts of this sort. Further, the company is given power to make all regulations in its discretion, some

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of which may be very burdensome alike to the village and to the private consumers, with only the limitation that they shall be reasonable and not contrary to law and not beyond the power of said village to permit. A more complete surrender by a village of its power to protect the public welfare in the important matter of street lighting can hardly be imagined. As to the agreement of the company to supply lights, it is substantially without force except as to gasoline or oil lamps. The agreement is in terms to keep the village and its citizens supplied with light by the six mentioned means and any or all of them. This, perhaps, would give option to the city, and might enable it, to compel the supply of gas and electric light at places where necessary; but it is at once qualified by the limitation that such supply shall be with gas and electric light only upon and along those parts of the highways where gas mains are laid at the time, or poles erected and wires strung. We search the contract in vain for any power in the city to compel the company to lay its pipe or stretch its wires at any specific place or to any specified extent. The only burden in the latter respect assumed by the company is that it shall commence the construction of its plant and active work in furnishing light within five months from the day of acceptance of the ordinance. As to when such construction shall be completed, the ordinance is silent, as also as to what shall constitute such completion. Even if this may require that either an electric or a gas plant be established, there is nothing here to require the laying of even a single block of gas pipe or the stretching of a single block of wire. Certainly, when the company shall have gone to even that extent, it will have satisfied every term of the contract. The rest of the village, if lighted at all, must be lighted with oil or gasoline, at prices, as we have said, 75 per cent. above those charged elsewhere, and with an absolute restriction upon the village against purchasing from any one else even this temporary form of light. The result is that this village has bound itself for fifty years to buy oil or naphtha lights from this company at a grossly excessive price, presumably so profitable as to remove the motive of

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self-interest which perhaps might otherwise be relied on to induce extension of gas mains and electric wires sufficiently to meet the most pressing public needs. Thus the village may never within that term be able to obtain, except to the most trifling extent, any of the modern forms of street lights, for it can buy them of no one else.

We have perhaps carried the detailed analysis of this ordinance further than was necessary, and may end it here, although there are various other phrases, clauses and provisions of the contract most significant of a result or purpose to merely benefit the company, without thought or consideration for the public welfare. We cannot avoid the conviction that the terms of this ordinance and contract bring it within that degree of unreasonableness which, after yielding all due deference to the discretion vested in the municipality, compels us to say that that body has transcended the powers delegated to it by the Legislature, and that its act in passing this ordinance and entering into this alleged contract is void for that reason.

Some contention is made that because the Legislature requires the village board to grant a franchise when, upon submission to popular vote, the majority of the votes have been in the affirmative (section 959-52), the doing of such act is no longer discretionary with the village board, but is in effect the act of the Legislature, and therefore cannot be reviewed by the courts as to its reasonableness. This argument confuses the municipal corporation with the village board. It is not alone the acts of one or another of the several village officers which are subject to review for unreason by the judiciary, but the act of the corporation itself, which is also a mere delegate of certain powers, which it must exercise within such delegation. Now, the electorate of this village, in special election assembled, is none the less an agency of the municipality than is the village board or any of the village officers, within their respective jurisdictions. True, the electorate comes nearer to the whole people of the village, who are the corporation, but it does not constitute the whole. It may speak for and bind the whole only within the limits of the authority cor-

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rested upon it, just as can the village board or any other officer. No authority is cited for the proposition that, because the village acts in some other way than through its village board, its acts, however unreasonable, are beyond revision and correction by the judiciary, and no reason presents itself to our minds in favor of such view. This ordinance, if unreasonable, is as much void when approved by a certain number of the electors as if the village had acted through any other of its authorized agencies, though doubtless the assent of so large a part of the community would be recognized by the courts as a cogent circumstance in support of the reasonableness of an ordinance.

It is further urged that although we might find this ordinance unreasonable and therefore illegal in certain respects—as, for example, in its length of time—we should restrict the invalidity to those elements, leaving valid the other portions. It is hardly necessary, after the discussion of the grounds of the invalidity of this ordinance, to say that they so permeate the whole and are so obviously interdependent, and the consideration, either to the village or to the company, for all the provisions thereof, that no such severance is possible. We cannot, for example, eliminate one-half of the price for gasoline lamps and say that the ordinance and contract shall stand valid as against the company at such diminished price; nor can we supply in the contract an agreement by the company to supply lights of different kinds, as the village government may deem public welfare to demand in the future. Hence we can find no escape in this contention from the conclusion of complete invalidity.

Many other grounds for invalidating the ordinance in question are asserted and have been vigorously argued, but, as complete invalidity results from the considerations already stated, discussion and decision of the others would be needless expenditure of labor. We, therefore, do not pass upon them.

Judgment reversed, and cause remanded with directions to render judgment in favor of the plaintiffs according to the prayer of the complaint.

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Power of municipality to contract for electric light.—The power of municipalities to provide by contract for the lighting by electricity of its streets is usually conferred by statute and must be exercised in conformity therewith. The supplying of the inhabitants of a city with electricity for use in their private residences and houses, is such a municipal purpose as to authorize its delegation by the Legislature to municipal bodies. *Jacksonville Elect. L. Co. v. Jacksonville*, 6 Am. Electl. Cas. 668, 36 Fla. 229, 18 So. 677, 51 Am. St. Rep. 24, 30 L. R. A. 540. Where a power is thus conferred upon a municipal body it cannot be delegated to a committee. *Foster v. Cape May*, 60 N. J. L. 78, 38 Atl. 1089. In Joyce on Electric Law, sec. 236, it is said: "A city empowered to act by ordinance upon a certain matter, by its common council, the mode and manner being left to its judgment as a deliberate body, cannot delegate its authority. In such cases it is the deliberate body in whom the power is vested, and discretion is confided that is required to be exercised, and not the judgment of another body or person acting under a delegated power. This rule does not, however, exclude committees appointed to ascertain and report facts, nor committees, persons or agents appointed to perform administrative or ministerial functions, or, as appears in some of the decisions, the appointment of committees and the empowering them to act in certain matters not purely administrative or ministerial, their acts being made subject to the approval of the appointing municipal body."

Reasonableness of contract.—Where a statute prescribes the term for which a street lighting contract may be made, such limitation is absolute and cannot be exceeded. *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127; *Black v. Chester*, 175 Pa. St. 101, 34 Atl. 354. A city contract is not unreasonable as to length of time which provides that gas shall be furnished by the electric light company to the municipality for five years at a specified rate, with the right on the part of the city to terminate the contract on three months' notice. *Hartford v. Hartford Elect. L. Co.*, 65 Conn. 324, 32 Atl. 925.

As to the reasonable length of time which a contract for electric lighting may be made to run, see *City of Denver v. Hubbard*, ante, p. 291; *Light, H. & W. Co. v. City of Jackson*, 73 Miss. 598, 19 So. 771.

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MUNICIPAL LIGHTING.**FAWCETT V. TOWN OF MT. AIRY.***North Carolina; Supreme Court.***POWER OF MUNICIPALITY TO ERECT AND MAINTAIN ELECTRIC LIGHT PLANT.—**

An expense incurred by a municipality in building and operating a plant to furnish lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred under section 7 of article 7 of the Constitution of North Carolina. The power to light the streets and public buildings and places of a city is implied, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. Possessing authority to do the lighting, the power carries with it incidentally the further power to provide the necessary plant to generate and supply the electricity required.

Appeal by defendant from decree for plaintiff. Decided December 19, 1903; reported 45 S. E. 1029.

S. P. Graves, for appellant.

Carter & Lewellyn, for appellees.

Opinion by MONTGOMERY, J.:

Whether a city or town has the right to incur an indebtedness for the erection and operation of plants for the supply of water and electric light for municipal use, and to sell to its inhabitants, as a necessary municipal expense, is the question again presented to us for decision. Indebtedness incurred by a city or town for a supply of water stands on the same footing as indebtedness incurred for lighting purposes, and, if such indebtedness be a necessary expense, then whether or not a municipality may incur it does not depend upon the approval of the proposition by a majority of the qualified voters of the municipality. It is only in cases where counties, cities, or towns undertake to contract debts or pledge their faith, or loan their credit or levy taxes, except for the neces-

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sary expenses thereof, that the submission of the proposition must be made to a vote of the qualified voters of such county, city, or town. *Wilson v. Commissioners*, 74 N. C. 748; *Tucker v. Commissioners*, 75 N. C. 274. It is almost impossible to define, in legal phraseology, the meaning of the words "necessary expense," as applied to the wants of a city or town government. A precise line cannot be drawn between what are and what are not such expenses. The consequence is that as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of progressive people, that things deemed unnecessary in the government of municipal corporations in one age should be so considered for all future time. In the efforts of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage. On this subject this court, in *Wilson v. Commissioners*, *supra*, uses the following instructive and suggestive language: "The analogy of the law of necessities for infants is the only one that occurs to us. It is held that if, considering the means and station of life of the infant, the articles sold to him may be necessities under any circumstances, they come within a class for which the infant may be liable, and, upon his refusal to pay, it is for a jury to determine whether, under the actual circumstances, they were necessary. If, however, the articles are merely ornamental, and such as cannot under any circumstances be necessary to one of the means and station of the infant, the court may, as a matter of law, declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application. But if treated merely as an analogy in the absence of other guides,

may be of some general use." It seems strange that it should be declared by some of our courts of highest reputation that the purchase of a town clock or hay scales or a pump is a necessary expense, when the supply of light to enable its citizens to walk its streets in security, or a supply of wholesome water to prevent disease and suffering, should be held as not a necessary expense. It is pretty generally held by the courts that the expense incurred for the widening of streets is a necessary expense; that a market house is a necessary expense; and, surely, if that be sound law, the courts ought to hesitate before they would pronounce a debt incurred for the furnishing of light and water not to be a necessary expense. And it seems to us that it may be reasonably considered as certain that the words "necessary expense" do not mean expenses incurred or to be incurred for purposes or objects that are only for the procurement or maintenance of things absolutely essential to the existence of the municipality. The expenditure of money for the widening of streets, the erection of market houses, town clocks, and hay scales are all considered as necessary expenses, and those things are not essential to the life of the municipality. A city or town might be fairly well governed, and be prosperous, without having appointed and fixed particular places for the sale of market produce, or without keeping the time of day or weighing grain and fodder; and certainly expenses incurred for water and light are more necessary than those for a market house, clocks, and scales. The words "necessary expense," then, must mean such expenses as are or may be incurred in the establishing and procuring of those things without which the peace and order of the community, its moral interests, and the protection of its property and that of the property and persons of its inhabitants, would seriously suffer considerable damage; leaving out of view the matter of the great inconvenience that would be attendant upon our present social life for want of such expenditures. The use of water from wells dug in populous communities is proscribed by the recent progress made in the science of bacteriology, the practical lessons of that science having been learned by the people generally. It is of com-

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mon knowledge that the most fearful scourges of certain most dangerous forms of fever arise from the use of water from wells in towns and cities, and it is out of the power of individuals in towns and cities to erect and operate appliances for supply of water. As to the question of lighting the streets and public places, the experience of all who live in towns and cities of any considerable population is that without lights upon the streets and in the public buildings, both life and property would be insecure, to say nothing of the almost complete destruction of the conveniences of life and the marring of its social features. The fire department, probably the most important of the municipal departments, would be rendered ineffective, and a considerable part of the commerce—trade of the country—would be destroyed, for, under our changed conditions, a good deal of the traffic between different communities and a respectable part of our mail service are conducted at night. It will not do to say that a city or town may expend money or incur a debt for the purchase of lights by the month or the year, but that it may not incur a debt for the construction and operation of a system of water works or for the installment of an electric plant for lighting. If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine. The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of "necessary expenses." The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts cannot control the discretion of the commissioners.

Our conclusion, then, is that an expense incurred by a city or town for the purpose of building and operating plants to furnish water and lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred, under section 7 of article 7 of the constitution, and that, under the general law of North Carolina in respect to cities and towns (Code, secs. 3800, 3821), municipal corporations may contract

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such debts, and provide for their payment, unless there is some feature in the charter of such city or town which prohibits it.

The power to light the streets and public buildings and places of a city is one of implication, where it is not specially conferred, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. It is a most important factor, too, in the preservation of the peace and order of the community. *Croswell*, Law of Elect. sec. 190; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558. In the case of *Crawfordsville v. Braden*, 130 Ind. 157, 28 N. E. 852, 14 L. R. A. 268, 30 Am. St. Rep. 214, the court said: "So far as lighting the streets, alleys, and public places of a municipal corporation is concerned, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and financial conditions of the corporation." It is well settled that the discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power and discretion are grossly abused to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

The cases on this subject heretofore decided by this court to the contrary of the present decision, one of which was written for the court by this writer, are overruled. The conclusion to which the present Chief Justice arrived in *Mayo v. Commissioners*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163, is the conclusion at which we have arrived in this case.

In the case before us the defendant, the town of Mt. Airy, was authorized by an act of the General Assembly at its session of 1901

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(Priv. Acts 1901, p. 594, ch. 216) to submit to the qualified voters of the town the question of issuing \$50,000 of town bonds for the purpose of defraying the expenses of constructing a system of water works and installing an electric plant to furnish the town with water and light. The question was submitted and carried, and the bonds were issued and sold. The proceeds were applied for the purposes mentioned in the act, but were insufficient to complete the plants. The board of aldermen of the town then passed an ordinance that they do borrow the sum of \$15,000 upon pledging repayment by issuing bonds of like amount, with interest. The plaintiffs commenced this action to enjoin the issuing of the bonds, and the injunction was granted by his honor Judge McNeill, and the defendant appealed. His honor followed the decisions of this court, and the error he committed was not his own, but it was error nevertheless.

Reversed.

Municipal electric lighting system.—Under a statute authorizing a municipality to provide for the lighting of its streets and public places, such municipality may construct and operate its own system. *Rushville Gas Co. v. Rushville*, 121 Ind. 212, 23 N. E. 72, 4 Am. Electl. Cas. 648, note; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 4 Am. Electl. Cas. 648, note; *Arbuckle-Ryan Co. v. City of Grand Ledge*, 122 Mich. 491, 81 N. W. 358. In Wisconsin it is held that a city may, under its general police powers, construct water works and electric light plants. *Elmwood v. Reedsburgh*, 91 Wis. 131, 64 N. W. 885; *Mauldin v. City Council of Greenville*, 33 S. C. 1, 11 S. E. 434.

Power to maintain electric light system where franchise has already been granted.—Although a municipal corporation has granted a license, not exclusive, to an electric lighting company to erect its appliances in the streets of the city, and the company has contracted to light the streets and public places; and in reliance upon such license and contract the company has expended large sums of money in the erection of its plant; still the municipality is not estopped from itself erecting a plant and going into the business of furnishing electric light, as by statute it is permitted to do. *Thomson-Houston Electric Light Co. v. City of Newton*, 42 Fed. 723. As to exclusive franchises for electric street lighting, see *Denver, City of, v. Hubbard*, ante, p. 291.

Furnishing lights for private use.—A city in erecting a municipal system of electric lighting is not limited to furnishing electricity for lighting the streets and other public places of the city, but may furnish the same for private use. *Thomson-Houston Electric Light Co. v. City of Newton*, 3 Am. Electl. Cas. 507, 42 Fed. 723; *Jacksonville Electric Light Co. v. City of Jack-*

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ville, 6 Am. Electl. Cas. 668, 36 Fla. 229, 18 So. 677; *Linn v. Chambers*, 4 Am. Electl. Cas. 647, 160 Pa. St. 511, 28 Atl. 842; *Crawfordsville v. Aden*, 130 Ind. 149, 28 N. E. 849, holding that a city has the right to establish works for lighting its streets, and in connection therewith to furnish private consumers such light by contract. Mr. Joyce, in his work on Electric Law, p. 237, says: "It would seem that a municipality or other local government within a State, which is expressly authorized to erect, maintain or purchase electric lighting plants, or which is required to purchase such plants in operation within its limits, in case the corporation desires to sell, would, by virtue of its necessarily incidental and implied powers, be authorized to furnish lights to private citizens for private purposes. This assumes that the original right to erect or purchase such plants has been lawfully exercised within all the limitations imposed by the legislative authorization, and that there are no constitutional objections as in case of exceeding the indebtedness limit."

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ACTION ON LIGHTING CONTRACT.

KAUKAUNA ELECTRIC LIGHT CO. v. CITY OF KAUKAUNA.

Wisconsin; Supreme Court.

1. ACTION ON LIGHTING CONTRACT; BREACH OF CONDITIONS.—An ordinance granting an electric lighting franchise, and providing for furnishing electric lights to the city at a stipulated price, is deemed, so far as the portion thereof which relates to furnishing light is concerned, a contract binding the company to furnish, and the city pay for, lights as prescribed therein. The portions of such ordinance requiring the company to place its wires underground and to paint its poles have no relation to the mere commercial contract of purchase and sale of lights, and their performance or breach is not material to the lighting contract, and do not affect an action brought thereon.
2. FAILURE TO GIVE BOND.—The failure of the contracting company to execute a bond as required in the ordinance to indemnify the city from all damages arising from an exercise of the company's franchise, and for its faithful compliance with the terms of the ordinance, is no defense in an action against the city for lights furnished under the contract where the sole demand was for a bond to indemnify the city from damages caused by privileges granted under the franchise. A bond given pursuant to this demand would have no bearing upon the question of damages arising from a breach of the lighting contract.
3. FAILURE TO FURNISH ADDITIONAL LIGHTS.—The ordinance requiring the company to furnish lights at a certain stipulated price should ordinarily be construed so as to bind the company to furnish lamps at the times and places required by the city; a failure to so furnish lights is a breach of the contract, precluding recovery thereon, if it be shown that the city has not accepted or voluntarily received any of the benefits arising therefrom.
4. RECOVERY OF CONTRACT PRICE UNDER CONDITIONS.—The plaintiff not being entitled to recover at all upon the contract owing to a breach of its terms, it cannot complain of the attaching of conditions to the recovery of the contract price requiring it to bury its wires and to give the bond demanded by the city.

Appeal by plaintiff from judgment for defendant. Decided March 11, 1902; reported 114 Wis. 327, 89 N. W. 542.

Plaintiff operates an electric light plant at the city of Kaukauna, occupying the streets with its poles, under a franchise in the form of an ordinance of the city, adopted September 5, 1889, which gives it a right to use the streets for

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the purpose of furnishing both arc and incandescent lights. By the second section the company contracts to furnish the city incandescent electric lights of certain sizes at certain prices; also to furnish certain lights for bridges, fire department, and council room, free of charge. Other sections of the ordinance provide that the company shall give a \$5,000 bond, conditioned "to indemnify and save harmless the city of Kaukauna of and from all damages which may in any way arise or grow out of the exercise by said grantee of the privileges herein granted," and further conditioned "for the faithful compliance by said grantee with all of the terms and provisions of the ordinance, and said bond shall be renewed at any time and as often as the common council of said city may require." It was also provided that after 10 years from the passage of the ordinance, "if the city deems it necessary, the said grantee shall be required to lay its wires under ground, including those already put up, at the rate of not less than two or more than four blocks per year, until all wires are under ground." The acceptance of the ordinance was declared to constitute a contract binding with equal force upon both parties thereto. This ordinance was duly accepted and a bond filed. On August 4, 1897, a supplemental contract was made, by which the company agreed to furnish, at a price specified, such arc lights as the city might demand, except that they should not be located more than 600 feet from existing lamps; such arc lamps to displace such incandescent lamps as the city should direct. Otherwise the former contract remained in full force, with the later contract as a supplement. On March 7, 1899, the city enacted an ordinance requiring certain painting of all poles in the city, expressly including those of this plaintiff, imposing a penalty or fine of \$5 for every 24 hours of disobedience after 30 days' notice. That notice was given about August 1, 1899. On July 11, 1899, a resolution was adopted, and communicated to the plaintiff, requiring additional incandescent lamps to be located at five or six specified places. On August 1, 1899, a resolution was adopted, and communicated to the plaintiff, requiring the company to give a new bond, in the sum of five thousand dollars, "to indemnify the city from all loss or damage by reason of the privileges granted them under their franchise." On the same day a resolution was adopted to notify the company that the city would exercise its right under the franchise to require the company to bury four blocks (not designated) of their wires after the 10 years should have expired, viz., September 5, 1899. On October 3, 1899, an ordinance was duly adopted, and notified to the plaintiff, reciting the provision of the franchise, and declaring the sense of the council that the burying of a portion of plaintiff's wires was necessary for the best interests and welfare of the city, and ordering the plaintiff to place under ground their wires on two specified blocks, and to commence such work within 30 days after the passage of the resolution, and to prosecute it with due diligence until its completion. The company made no attempt at compliance with any of the ordinances and resolutions of 1899 above recited, and on November 7th the council adopted a resolution reciting the failure to comply with said several ordinances and resolutions, and resolving that the city thereby declared said franchise and contract forfeited and broken; that it would no longer accept or pay for lights furnished by the company; and that the com-

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pany be, and it thereby was, ordered to remove from the public streets all poles, wires, and other fixtures. The same day was appropriated \$100 as payment in full to the company of all that was due it for light up to the date of that resolution, which money was tendered to it, and was brought into court and deposited at the time of answering. Plaintiff continued to run the pre-existing street lamps, but the city cut off all lamps within its control in the public buildings and on bridges, and neither received nor used any light or power from the plaintiff, after November 7th, voluntarily. Thereafter, at monthly intervals, the company presented its bills, which were not passed upon by the council, and within the time limited by the charter the company took appeals to the Circuit Court, until a large number of such appeals were pending, upon bills of about \$260 a month, which were afterwards consolidated into this one suit, making a total of \$4,222.08. The defendant interposed as answer a denial of compliance by the company with its contract, alleging all of the breaches of ordinances and resolutions above recited. It counterclaimed the same breaches to its damage \$5,000, and by a second counterclaim it set up the same breaches of duty; also that the city had no other means of lighting its streets, and could not practically supply another method; that the plaintiff was engaged in commercial lighting as well as street lighting, and used its poles and wires for that purpose, whereby the city was continually subject to liability, for which it had no adequate indemnity, in the form of a bond or otherwise; that the damage to the city from such breaches of contract by the plaintiff was great and irreparable, but difficult, if not impossible, of ascertainment; that a multiplicity of suits arose from the continued claim of the plaintiff to continue furnishing lights under the ordinance, alleging that, if the whole contract had not been effectively rescinded, the city was ready to comply on its part with all of its contract, provided the plaintiff should first perform the conditions of its franchise and contract; and prayed judgment dismissing the complaint, enjoining the commencement of any more suits or filing of any more claims before the council; also that the plaintiff be perpetually restrained from committing any breach of either of its two contracts; that it be compelled to place and maintain the additional lights demanded, and such others as might be demanded, by the defendant; and that by mandatory injunction it be compelled to bury its wires, as specified in the recited resolutions, and be compelled to furnish the defendant a bond in compliance with its contract; also that the same acts be enforced by decree of specific performance. The court found the facts substantially as above, and on October 30, 1901, rendered judgment that the two contracts of September 5, 1889, and August 4, 1897, be specifically enforced, by requiring the plaintiff, within four months from the service of notice of entry of the judgment, to deposit with the city clerk a bond in the penal sum of \$5,000, conditioned as required by the contract; that within like four months, adjudged to be a reasonable time, the plaintiff lay or place under ground its wires in the blocks specified in the ordinance; and that, upon affidavit filed with the clerk of court showing compliance therewith, judgment be entered in favor of the plaintiff and against the city for the contract amount of the service sued for, \$4,222.08; and further providing that, in case of failure to comply within four months with the mandatory

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portion of such judgment, the plaintiff take nothing by the action, and its complaint be dismissed; judgment without costs to either party. From that judgment the plaintiff appeals.

Humphrey Pierce (*D. S. Rose*, of counsel), for appellant.

Lyman E. Barnes, for respondent.

Opinion by DODGE, J.:

The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this State, where the city acts in a twofold capacity: First, as a governmental body exercising delegated power of the State, it confers, and limits with conditions, the privilege or franchise to use the public streets, under authority of section 1780b, Rev. St. 1898. *State v. Superior Ct. of Milwaukee Co.*, 105 Wis. 651, 673, 81 N. W. 1046, 48 L. R. A. 819; *State v. Portage City Water Co.*, 107 Wis. 441, 445, 83 N. W. 697. It is true that no such authority had been delegated when, in 1889, this ordinance was enacted, and it was perhaps originally void. This want of authority with reference to electric lighting companies was, however, supplied by chapter 192 of the Laws of 1893, which probably may be considered as ratifying the original ordinance. In addition to this function as an agent of the State, however, the city, in the same instrument or ordinance, exercises its function as a business corporation, with power to purchase, contract for and pay for electric lights for public purposes, and to specify the conditions of such contracting,—a power arising under its own charter. In the argument in this case, as in the ordinance itself, these two functions are greatly confused, and it is not always easy to separate those provisions which pertain to the one portion or the other of the instrument. In the formulation of such a document, reciprocal duties are usually imposed both upon the grantee of the franchise and upon the city. Some of these duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying lights to the city, to be paid for when so supplied. Other

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provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the State to occupy the public streets. The plaintiff's action is predicated wholly upon the commercial contract embodied in the original ordinance and in the supplemental contract with reference to arc lights. The city's defense thereto is breach by the plaintiff of several of the obligations which it assumed. In dealing with this street-lighting contract, the parties stand purely and simply as contractors, governed by the same rules of law which govern private contractors, except so far as the known situation of each may control the interpretation of their mutual promises. The company is to do certain things as a consideration of the city's promise to pay, and, as in the case of any other contract, the city's duty to pay arises only on performance of such of the undertakings of the company as can be fairly said to constitute essential consideration therefor. This consideration makes it necessary to examine the various failures of duty on the part of the plaintiff alleged and found to have occurred, in order to ascertain whether any of them were fairly germane to the contractual aspect of the ordinance, and conditions precedent to the duty of the city to perform its part of that contract. The obligations and conditions assumed by the company, and breached by it, which the answer sets up by way of defense, are four: First, that the company has failed and refused to place underground its wires when ordered so to do by the common council; second, that it has failed and refused to paint its poles in the manner required by a city ordinance; third, that it has failed and refused to give a new bond as demanded by the city; and, fourth, that it has failed and refused to install incandescent street lamps when and where demanded by the council.

As to the first two of these,—the burying of the wires and the painting of the poles,—we deem it entirely clear that they have no relation to the mere commercial contract of purchase and sale of lights; that they pertain wholly to the gift and continuance of the

franchise to use the streets, if, indeed, the painting of poles can be deemed a condition of the original ordinance at all. They do not in any wise affect the interests of the city as a buyer of public lighting. They may affect its municipal government and policy as to the care and protection of the streets, but in that respect they are relevant only to the propriety of the continuance of the plaintiff's franchise to use the streets. Hence we conclude that their performance or breach is in no wise material to the lighting contract; that, if any penalty results to the plaintiff therefrom, it is a forfeiture of its franchise, which can be enforced only at suit of the State. *State v. Madison St. Ry. Co.*, 72 Wis. 612, 40 N. W. 487; *Wright v. Light Co.*, 95 Wis. 29, 36, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74. So long as the State allows that franchise to continue in existence, if the company duly performs its promise to furnish lights in the manner prescribed by the ordinance, it arouses the duty of the city to pay therefor according to its promise.

The agreement of the plaintiff to give, and, whenever requested, to renew, a bond conditioned to indemnify and save harmless the city from all damages which may in any way arise or grow out of the exercise by said grantee of the privileges granted, and for the faithful compliance by the company with all the terms and provisions of the ordinance, has a more complex aspect. Damages may arise to the city both from the exercise of the franchise, and from the manner of performing the lighting contract. The poles may be so placed or so out of repair as to constitute defects in the highway, and subject the city to liability, or impose upon the city otherwise unnecessary expenses in the maintenance of the streets. In this aspect it is germane alone to the franchise granted by the State, through the agency of the city. But damages may also arise from breaches in the performance of the duty to supply street lighting. The city may thereby be put to expense for purchase of lights deemed by it necessary, and otherwise suffer damage of the same character as would arise if there were purely and simply a lighting contract, disassociated from the franchise. Hence, if properly demanded, the refusal of the company to renew its bond

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might constitute such a breach on its part, of the contract, as to justify the city in terminating it,—in deeming itself unsafe to proceed therewith in the absence of this bond which the company had contracted to furnish, as one of the considerations upon which it was to earn payment for lights furnished. In this aspect, however, we think, technically, the city has not placed the corporation in default with reference to the renewal of the bond, since it has made no sufficient demand for a new bond to protect itself against these contractual aspects of liability, within the promise of the company to supply one. The sole demand was by ordinance of August 1, 1899, for a bond “to indemnify the city from all loss or damage by reason of the privileges granted them under their franchise.” A bond satisfying this demand would have no bearing upon or relation to damages suffered by reason of nonperformance or misperformance of the lighting contract, and we therefore conclude that the failure to comply therewith constitutes no defense to demand for payment. Had the demand been as broad as the ordinance requirement, a different question would be presented.

The remaining undertaking, breach of which is alleged and found to have occurred, is as follows: Plaintiff’s assignor “hereby agrees to furnish the city of Kaukauna, for street and public lighting, incandescent electric lights, . . . of twenty-five candle power, at a cost,” etc. This agreement may also have a complex aspect, as it may well have been one of the considerations and conditions upon which the city deemed proper to grant the plaintiff the right to use the public streets for distribution of its product to its customers. Whether so or not, it very clearly must have been a most important consideration of the city’s promise to pay for street lights furnished to it. The duty of effectively and economically lighting its streets is one of the most important which a city has to perform, and one which can be properly accomplished only by adoption of some system. While it is possible, perhaps, to make an attempt at street lighting by means of an oil lamp at one corner, a gasoline at another, or gas and electric lights in alternation, such method, generally speaking, is neither practical, effective, nor economical. According to modern practice, a city seems to have

ut a choice between two methods of performing this duty,—either to contract with some private corporation, or to erect and operate a plant of its own. In the case of a small city, a binding acceptance of the former alternative, in practical effect, is exclusive of further consideration of a general policy. If thenceforward the city must buy of that corporation any considerable portion of its lights, it can neither buy others of any one else, nor economically supply them itself; for the whole field of such a city is ordinarily none too large to warrant installation of a plant, either by private capital or by the city, and, after the final surrender of a part of such field to one, supply of light to the remainder by another can only be accomplished at such expense as to make the attempt impracticable. In view of these considerations, it is not open to doubt that the parties understood and intended by their contract that the city must be dependent on the plaintiff for all electric lighting which it, as the custodian and guardian of the public welfare, should deem necessary; hence that the plaintiff bound itself to furnish all so necessary, at least within reasonable requirements. A construction that the company was to furnish only so many lights and at such places as it chose must proceed upon the assumption that the city intended to abrogate its power to perform its public duty,—an assumption not to be adopted except in an entirely clear case. Nor can it be doubted that this agreement by the plaintiff to furnish such lights as the city might, in reason, deem necessary and demand, lay at the very foundation of the promise by the latter to pay the price therefor. If the city must buy of the company those lights already installed, it cannot practically or economically obtain elsewhere others which it may deem necessary; while, on the other hand, if absolved from duty to purchase any from plaintiff, it is much more feasible for the city either to offer a contract to other parties, or to erect a plant of its own. It is not conceivable that the parties in a contract like this intended or understood merely that the furnishing of each lamp should be the sole consideration of the promise to pay the contract price thereof. That would not accomplish at all its main purpose, namely, to supply the city with a system of electric street lighting to satisfy the needs of the public.

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To this end, the placing of lamps when and where needed is quite as essential as supplying an electric current to those which are placed, and is quite as surely the consideration of the promise to pay. It is, too, quite incapable of compensation in damages or by deduction; for no one can tell how much the contract price was enhanced in consideration of the duty to install lights where demanded, and the injury to the city cannot be measured by money.

Thus the plaintiff stands before the court convicted of failure to perform the service which the parties agreed should arouse the duty of defendant to make the payments sought to be enforced. Generally speaking, no rule of law is more elementary or better settled than that one cannot recover the contract price when he has not performed the precedent contract consideration material to the contract purpose, and not measurable in damages. *Ellen v. Topp*, 20 Law J. Exch. 241; *Graves v. Legg*, 23 Law J. Exch. 228; *Robinson v. Brooks* (C. C.), 40 Fed. 525; *Davis v. Hubbard*, 41 Wis. 408; *Hardware Co. v. Berghoefer*, 103 Wis. 359, 364, 79 N. W. 564; *Coorsen v. Ziehl*, 103 Wis. 381, 384, 79 N. W. 562. This rule has its modifications, arising out of conduct of the defendant upon which can be predicated an assumption of acceptance, consent, or waiver. When this exists, so that the plaintiff has parted with its property or service upon the justifiable belief that it is voluntarily received by the defendant as satisfying the contract, the latter will not be permitted to defend on the ground of imperfections or differences which it might have detected and made basis of refusal before receiving the benefit, or permitting plaintiff to suffer the loss. *Locke v. Williamson*, 40 Wis. 377; *Monroe Waterworks Co. v. City of Monroe*, 110 Wis. 11, 21, 85 N. W. 685; *Bostwick v. Insurance Co.* (decided herewith), 89 N. W. 538. This case is, however, barren of any such circumstances. The city waited a reasonable time (some three months) after demanding the additional lights, until plaintiff's purpose not to furnish them became clear, paid for the lights actually furnished meanwhile, and then notified plaintiff that it would no longer accept or pay for lights furnished by it. It did not accept any further service. True, street lights continued to burn, but not with the city's consent, and

without any power on its part to prevent them. Clearly, therefore, the plaintiff has not performed the lighting contract on its part during the period covered by the bills sued on, and the city has not accepted or voluntarily received any of the benefits thereunder, upon which its promise to pay depends; and a complete defense was set up and proved against the plaintiff's cause of action at law, so that it was not entitled to recover, and judgment dismissing the complaint would have been proper.

The defendant in this case further contends that by reason of plaintiff's breach the principal purpose of the lighting contract had been defeated, and the plaintiff had conclusively declared its purpose not to be bound thereby as to one of the essential elements, whereby the city had a right to, and did, treat the contract as abandoned, and finally terminated it by its resolution and notice of November 7, 1899. The right of one party to terminate a continuing contract upon substantial breach of its essential elements by the other, often inaccurately called "rescission," is one which has been treated in cases without number, both English and American, and with extreme refinement and technicality. Many of those cases are collated in a note to *Railroad Co. v. Richards* (Ill.), 30 L. R. A. 33 (s. c. 38 N. E. 773); and the subject has been treated in *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573; *School Dist. v. Hayne*, 46 Wis. 511, 1 N. W. 170; *Hoffman v. King*, 70 Wis. 372, 36 N. W. 25; *Walsh v. Myers*, 92 Wis. 397, 402, 66 N. W. 250. We do not, however, find it necessary to decide whether defendant has effectively terminated the contract in question, so that, should plaintiff, after the notice of termination, install the additional lamps, it would be too late. We think defendant is foreclosed from such contention by reason of its course in this litigation, of which we shall speak later.

It appears from the foregoing that the plaintiff, by reason of nonperformance of the lighting contract on its part, was not entitled to recover at all upon its cause of action; hence, of course, a judgment allowing recovery upon certain conditions cannot preju-

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dice the rights of the appellant. If not entitled to recover, it cannot be injured by placing conditions upon the privilege of recovery. So, as to that part of the judgment which provides that upon burying wires and giving new bond within four months after notice of the entry of judgment, it may recover the sum sued for, without interest and without costs, the appellant has no just ground of complaint; and, were that all of the judgment, we should feel bound to affirm. But that is not all of the judgment. There is in addition a mandatory decree for specific performance of two of the duties assumed by the plaintiff under the ordinance, namely, the duty to bury that part of its wires specified in the ordinance of October 3, 1899, and to give a bond, not in accordance with the demand of the resolution of August 1, 1899, but in complete accordance with the original franchise ordinance. We have already pointed out that the burying of the wires and the giving of a bond conditioned as demanded on August 1, 1899, are neither at all germane to the electric lighting contract upon which the suit is brought. It is an interesting question whether a city, having secured for the benefit of its citizens, constituting a part of the public, certain agreements as a condition of the granting of a franchise on behalf of the State, may maintain an action in a court of equity for specific enforcement of those agreements. The subject is learnedly discussed, and an affirmative conclusion reached, in *City of Burlington v. Burlington Water Co.*, 86 Iowa, 266, 53 N. W. 246; and mandamus was sustained in *State v. Janesville St. Ry. Co.*, 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759, 41 Am. St. Rep. 23. But in this case an obstacle lies at the threshold of considering and deciding that question. That relief is sought, not by an original suit in equity, but by way of counterclaim to a simple action at law for the recovery of money upon a contract which happens to be contained in the same writing as that which grants the franchise and imposes the conditions upon it. As we have already said, breaches of the conditions which relate only to the franchise can constitute no defense against the duty of the city to pay for the electric light which it agreed to purchase. They affect only the right of the plaintiff to continue to use the public streets for carrying on its business of manufacturing

and selling such light, and so long as the State chooses to allow that franchise to continue, and the contracting company does furnish the lights as agreed, the duty of the city to pay therefor is not diminished or in any wise affected by the breaches of those conditions or agreements, unless, indeed, there should thereby arise a money injury to the city, for which it might be entitled to bring suit, and therefore might counterclaim to diminish or defeat the plaintiff's money recovery. From the earliest adoption of our Code authorizing counterclaims, it has been held, in pursuance of former New York decisions inhering in the statute when adopted by us, that a demand may be pleaded as counterclaim only when, if established, it would in some way qualify or defeat the judgment to which the plaintiff would otherwise be entitled. *Dietrich v. Koch*, 35 Wis. 618; *Heckman v. Swartz*, 55 Wis. 173, 12 N. W. 439; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697. Now, here it is apparent that quality does not exist. It is entirely consistent that the plaintiff, if it had fulfilled its lighting contract, might be entitled to recover the full contract price, and yet be under an obligation to perform certain of the other conditions contained in the same ordinance, pertaining to the franchise aspect thereof. If it were conceded that the defendant city might maintain a bill in equity to specifically enforce the contract to bury wires, that would in no wise defeat or qualify the right of the plaintiff to its money judgment. Hence it seems clear that, as to the two conditions or agreements made the subject of a decree of specific performance in this action, the defendant could not interpose a counterclaim for such result, even if it might maintain an independent suit for the same relief. So far, therefore, as the judgment before us contains a mandatory decree requiring the plaintiff absolutely and not in the alternative, to bury wires and give bond, it is erroneous, to the hurt of the plaintiff. Hence we conclude the judgment must be modified by eliminating that portion decreeing specific performance of these obligations.

In sustaining the rest of the judgment, which gives plaintiff a money recovery on conditions, when it is entitled to no recovery at all, a word of explanation or interpretation seems necessary. In

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the counterclaim the defendant sets up past breaches, and threatened continuance of breaches, of the contract, including those which we have held not germane to the cause of action stated in the complaint, and also the refusal to install lights, which we have held to be germane. It substantially offered that, if the court concluded that the contract had not been effectively terminated and rescinded, the city was willing to continue it upon condition that all the refusals to abide its terms were abandoned by the plaintiff, and to pay such sum as it ought to pay for any lights which had been furnished. It prayed variety of equitable relief, in the form of injunction both prohibitory and mandatory, and in the form of specific performance. The glaring error in the judgment, which we have already pointed out, was the granting of absolute specific performance of duties having no relation to the cause of action stated in the complaint. The refusal of some form of equitable relief with reference to the failure of the plaintiff to install additional street lights, if erroneous, was prejudicial only to the defendant; hence not to be supplied upon the plaintiff's appeal. We must, however, construe the judgment as taking the defendant at its word, and decreeing that the rescission or termination of the contract, if accomplished, is abandoned by the city; that the contract stands in full force against both parties; that plaintiff, not being legally entitled to recover any sum upon the street-lighting contract, should yet recover a somewhat arbitrary sum when and if it repaired certain omissions; and that its failure to repair such past omissions shall merely result in loss of the specified money recovery. Thus viewed, the judgment, at worst, erroneously denied only rights claimed by the defendant, except as it decreed specific performance. Its spirit was to relieve against the rescission claimed by the defendant, whom we consider to have assented thereto by not appealing. Its plan, also, was to allow plaintiff a reasonable opportunity after its rights were determined to perform the conditions whereby it should earn the money recovery. But those rights never have been correctly determined; hence we deem it but equitable that the appellant should still have the four months, after final entry of corrected judgment, to perform the conditions imposed.

We therefore shall reverse and remand, with directions to enter a new judgment omitting the erroneous portion, instead of modifying the judgment here as of its original date.

The judgment is reversed, and the cause remanded, with directions to enter judgment to the same effect as before, excepting the positive command therein contained for specific performance of certain contract provisions.

Opinion of BARDEEN, J. (concurring):

I fully concur in the result reached in this case. It was not found necessary to determine whether the action taken by the city was effectual to constitute a rescission of its lighting contract. It attempted not only to rescind the contract for lighting, but also to put an end to its franchise to use the streets. As regards its attempt to oust the company of its franchise rights, granted to it by the city as the agent of the State, its action is held nugatory. That power rests in the State alone. The city claimed the right to rescind the lighting contract. That right is said to have been based upon the refusal of the company to install some half a dozen incandescent lights ordered by the city. This refusal arose from a claim by the company that the second contract superseded the first, to the extent that further incandescent lights could not be required by the city. There was no claim that the company had abandoned its contracts, or was seeking to avoid their obligations, only in the respect just mentioned. The dispute was bona fide, and the claim of the company had some elements of plausibility. In such a case I very much doubt the power of either party to effectually terminate the contract by a mere declaration to that effect. But even if that power exists, under the facts here presented, the court should be slow to uphold it. The language of the Supreme Court of the United States in *Rutland Marble Co. v. Ripley*, 10 Wall. 339, is quite applicable:

"That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled." See *Lundahl v. Hansen*, 147 Ill. 504, 35 N. E. 741; *Mining Co. v. Briscoe* (C. C.), 47 Fed. 276.

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Again:

"It is not every partial neglect or refusal to comply with some of the terms of a contract by one party which will entitle the other to abandon the contract at once. In order to justify an abandonment of it, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by the misconduct or default." *Selby v. Hutchinson*, 4 Gilman, 319.

Another element entering into the question of rescission is that the party rescinding must, so far as possible, put the opposite party in his original position. In continuing contracts this is frequently impossible, and hence the courts, when there are bona fide disputes, often say that the injured party must come into court before the rescission can become effectual. A declaration of rescission may become the basis for the court to declare it, but it is not always the case that the party himself has the right of absolute rescission. The courts recognize the distinction between executed and executory or continuing contracts in this regard, and it is one, I think, the city should have in mind in its future dealings with the company. The right of rescission at law usually rests upon such a refusal of the one party to perform as entitles the other to believe the contract has been abandoned. Such was the case of *School Dist. v. Hayne*, 46 Wis. 511, 1 N. W. 170. When the matter gets into a court of equity, the court may or may not decree a rescission, according to the equity of the case, and may even relieve from forfeiture when the justice of the case demands, as in *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. While the default of the company may be, as held in this case, sufficient to prevent a recovery of periodical payments due on the contract, it does not necessarily follow that the city may consider the contract at an end. If its remedy at law is not deemed adequate, its rights may be protected and enforced in the forum of equity, either by a decree of rescission or specific performance.

MARSHALL, J.:

I concur in the foregoing opinion by Mr. Justice BARDEEN.

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Other Cases Relative to Contracts for Electric Lighting.

1. Contract with village from year to year; what constitutes renewal.—In the case of *Howell Elect. L. & P. Co. v. Village of Howell*, 92 W. (Mich.) 940, the village of Howell contracted with the plaintiff lighting its streets for a term of five years; at the expiration of the term a new contract was made for a term of one year. No new contract was thereafter made, but the company continued to furnish light, which was paid for at the rate specified in the contract. Subsequently the village trustees passed a resolution stating that they would not be bound further by lights furnished, and directing the company to cease lighting. The plaintiff contended that the furnishing of light after the expiration of the annual contract, and its acceptance by the village, bound the village for another year. The court held that there was no renewal of the contract by such acceptance and that the village was not bound.

2. Power of municipal board to contract for light; contract for term of ten years; exclusive privilege.—In the case of *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167, the mayor and board of aldermen of the city of Vicksburg directed a contract for street lighting to be made with the Vicksburg Railroad, Power and Mfg. Co., to run ten years from its date. The appellants filed their bill in chancery to enjoin the execution of the contract on the following causes: (1) Under the act of March 10, 1888, the city could not make such a contract except after submitting it to the qualified voters; (2) if this is not true, then it must have advertised for bids; (3) it guarantees a special levy of taxes to meet the obligations incurred; (4) it is unreasonable and oppressive; (5) it grants an exclusive right; (6) it was entered into for the purpose of making an appropriation, and giving the aid of the city to the street railway company; (7) in awarding the contract, the council acted arbitrarily, without exercising any discretion whatever, which made it illegal; (8) the company suppressed a contemplated bid for the contract.

It was held by the court (as indicated in headnote to case as reported in 29 So. 167):

(a) Vicksburg city charter enacts that the board of mayor and aldermen shall not make contracts exceeding a certain amount, for work on public streets or public buildings, without advertising for sealed bids, and that certain additional powers may be exercised by such board, "by ordinance and resolution," at "regular or special meeting." Acts 1886, p. 694, gives the board additional power "to provide for the lighting of said city by electric lights or other methods." Held, that electric lighting was not to be regarded as relating to work on public streets or buildings, and the board might pass ordinance for electric lighting without advertising for bids.

(b) Act March 10, 1888, sec. 1, appointing a commission with power to contract with electric lighting companies for lights for public use, and providing that the power granted should extend to incorporated cities, the authorities of which should make such contracts after submitting them to the voters, "unless otherwise provided" by the charter of any such city, does not

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apply to or modify Vicksburg city charter, since such charter, as amended by Acts 1886, p. 694, gives its municipal board power to provide for electric lighting by ordinance, and is therefore "otherwise provided."

(c) A contract by a city for the lighting of its streets for a period of 10 years was not invalid as for an unreasonable time.

(d) A contract by a city for the electric lighting of its streets for a period of 10 years by a corporation was not contrary to Const. sec. 183, forbidding a municipality to make appropriation or loan its credit to any corporation.

(e) A contract by a city for the lighting of its streets for a period of 10 years was not void as conferring an exclusive privilege.

(f) The objection that a contract by a city for the lighting of its streets was void, as being exclusive, could only be invoked by the city or a party making application for privileges.

(g) A taxpayer cannot object to a provision for a special levy in a city's contract for electric lighting until it is shown to be a damage to him by being in excess of the charter limitations as to total levy.

3. Municipal contract for street lighting under New Jersey statute.—In the case of *Platt v. City of Englewood*, 68 N. J. Law, 231, 52 Atl. 239, the city council of Englewood passed an ordinance confirming a contract with the Gas & Electric Company of Bergen county for lighting the streets of the city, and binding the city to pay a specified price therefor. Such ordinance was not submitted to the mayor; and it was held that the contract was invalid. The court said:

"The illegality alleged with respect to the action of the common council, that has been certified, is that it was not submitted to the consideration of the mayor of the city. The motion of August 7, 1900, was merely preliminary, and within the power of the council alone, but as to the attempt to make a contract on September 4, 1900, the objection taken is fatal. The city of Englewood was incorporated by chapter 40 of the Public Laws of 1899 (P. L. p. 72), and is governed by chapter 52 of the Public Laws of that year (P. L. p. 96). By section 15 of the act last cited, it is provided that every ordinance or resolution passed by the common council shall, before it takes effect, be presented, duly certified by the city clerk, to the mayor, who, if he approves it, shall sign it, and if he does not approve it shall return it, with his objections, to the clerk, within five days after the presenting thereof, and, in case of such return, then only, if, on reconsideration, it shall pass the common council by a vote of two-thirds of all the members, shall it take effect notwithstanding such objections. It is too plain for contrary argument that a contract binding the city, such as was attempted to be made in the present case, can only be legal if effected by an ordinance or resolution duly presented to the mayor and the consequent proceedings prescribed as above recited. The contention for the defendants is that the resort to a mere motion instead of a resolution took the case out of the statute. The action taken was a palpable, but unsuccessful, attempt to evade the requirement of the law. The motion, when carried, became a resolution of the council. The point has already been ruled on in this court, under like circumstances. *Pierson v. City Council*, 61 N. J. Law, 404, 39 Atl. 675. Furthermore, the only statute that would authorize such a con-

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act as was attempted expressly provides that it shall be made by ordinance or resolution. P. L. 1894, p. 477."

4. New Jersey; township lighting.—In the case of *Mason v. Cranbury Township*, 68 N. J. Law, 149, 52 Atl. 568, it was held that under the "Act concerning townships" (Rev. Law, 1899, p. 372), the power of a township committee to provide for public lighting is not limited by the restriction contained in sec. 72 of such act, to the effect that a township committee shall not enter into a contract for a public improvement or the purchase of any property for the use of the township unless an appropriation has been voted or authority given for the issue of bonds. It was also held that a contract for lighting was not void because extending for a period of more than one year.

5. Pennsylvania statute; submission of ordinance to chief burgess of borough.—In the case of *Jones v. Schuylkill Light, Heat & Power Co.*, 202 Pa. St. 164, 51 Atl. 762, it was held, under the act of May 23, 1893, providing that every ordinance and resolution which shall be passed by council shall be submitted to the chief burgess of such borough for his approval, that a resolution of the council accepting the bid of an electric light company to light the streets for a term of years to be presented to the chief burgess for his approval, when it is not in pursuance of a general ordinance providing for the lighting of the streets, and authorizing contracts therefor at stated periods. Evidence of prior borough ordinances to prevent interference with borough lights and of prior contracts for lighting for similar periods of years is not sufficient to show that the resolution accepting the bid in question was in pursuance of a general ordinance authorizing such contract.



PART IV.

STATE AND LOCAL TAXATION OF ELECTRIC COR-
PORATIONS.

(267)



LICENSE TAX UPON TELEGRAPH AND TELEPHONE COMPANIES.

ATLANTIC & PACIFIC TELEGRAPH CO. v. CITY OF PHILADELPHIA.

United States; Supreme Court.

1. VALIDITY OF LICENSE TAX UPON TELEGRAPH COMPANY; INTERSTATE COMMERCE.—A license fee imposed upon a telegraph company by a city to compensate the city for the enforcement of local governmental supervision of the poles and wires of such company is not obnoxious to that provision of the constitution conferring upon Congress the power to regulate interstate commerce. The municipality may make the fee large enough to cover any reasonable anticipated expenses; it may fix such charge in advance and need not wait until the end of the period for which the license is granted; and, although it may not act arbitrarily or unreasonably, the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of supervision.
2. REASONABLENESS OF LICENSE FEES.—While it is true that the reasonableness of an ordinance imposing a license fee upon a telegraph company is a question for the court and not the jury, especially where the question of reasonableness turns on the character of the regulations prescribed, yet, when it turns upon the reasonableness of the amount of the license fee, it may rightly be left for the determination of a jury. Where testimony is produced showing that the actual cost of the maintenance, repair and supervision by the company of its lines during the year for which the license fee was charged was less than one-half that charged by the city for supervision alone, and that at first the license fee per mile of overhead wire was \$2.50, and of underground wire \$1, and that within three years thereafter the charges in respect to underground wire were taken away, and that, as declared by the head of the electrical department, the charge for underground wire was so taken away for the purpose of inducing the removal of overhead wires and placing them all under ground, the court erred in withdrawing the case from the jury. In view of such testimony the jury might have come to the conclusion that the charge was not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and place them in conduits.

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Error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment for the plaintiff in an action to recover license fees imposed by the city of Philadelphia upon a telegraph company.

Decided June 1, 1903; reported 190 U. S. 160, 23 Sup. Ct. 817.

Statement by Mr. Justice BREWER:

This action was commenced in the Common Pleas Court of Philadelphia on December 31, 1891, to recover the sum of \$3,715 as license fees alleged to be due the city for the six preceding years. The case was removed by the defendant to the Circuit Court of the United States for the Eastern District of Pennsylvania. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff for a part of the sum claimed, which judgment was thereafter reversed by the Circuit Court of Appeals. A second trial was had in April, 1901, before the court and a jury, which resulted in a verdict and judgment for the full amount claimed, with interest. From such judgment the case was brought to this court directly on writ of error, on the ground that it involved the construction and application of the Constitution of the United States; that the action was brought to recover from the telegraph company certain license charges imposed by the city which the company claimed the city had no right or power to impose, for the reason that it was a regulation of commerce between the States.

John F. Dillon, H. B. Gill, Silas W. Pettit, George H. Fearons,

Rush Taggart, Henry D. Estabrook, and Brown & Wells, for plaintiff in error.

John L. Kinsey and James Alcorn, for defendant in error.

Mr. Justice BREWER delivered the opinion of the court:

The question presented is as to the validity of the charges imposed by the ordinances of the city of Philadelphia upon the defendant (plaintiff in error), a corporation engaged in interstate commerce. Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There

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have been many cases, in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.

First. As said by Mr. Justice BRADLEY, speaking for the court, in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 492, 30 L. Ed. 694, 696, 1 Inters. Com. Rep. 45, 46, 7 Sup. Ct. Rep. 592, 593:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation."

In addition to the many cases referred to by him, the following subsequent decisions may also be cited: *Fargo v. Michigan*, 121 U. S. 230, 246, *sub nom. Fargo v. Stevens*, 30 L. Ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336, 346, 30 L. Ed. 1200, 1201, 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 357, 30 L. Ed. 1187, 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 497, 31 L. Ed. 700, 711, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leloup v. Port of Mobile*, 127 U. S. 640, 648, 32 L. Ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 131, 32 L. Ed. 368, 369, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 32 L. Ed. 637, 639, 9 Sup. Ct. Rep. 256; *Leisy v. Hardin*, 135 U. S. 100, 110, 34 L. Ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 104, 109, 34 L. Ed. 391, 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Re Rahrer*, 140 U. S. 545, 555, *sub. nom. Wilkerson v. Rahrer*, 35 L. Ed. 572, 574, 11 Sup. Ct. Rep. 865; *Crutcher v. Kentucky*, 141 U. S. 47, 58, 35 L. Ed. 649, 652, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289, 304, 38 L. Ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Interstate*

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Commerce Commission v. Brimson, 154 U. S. 447, 471, 38 L. Ed. 1047, 1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *United States v. E. C. Knight Co.*, 156 U. S. 1, 21, 39 L. Ed. 325, 332, 15 Sup. Ct. Rep. 249; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. Rep. 757; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. Rep. 96; *Stockard v. Morgan*, 185 U. S. 27, 46 L. Ed. 785, 22 Sup. Ct. Rep. 576.

Second. No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 211, 29 L. Ed. 158, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 29 L. Ed. 785, 6 Sup. Ct. Rep. 635; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Fargo v. Michigan*, 121 U. S. 230, 245, *sub. nom. Fargo v. Stevens*, 30 L. Ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336, 30 L. Ed. 1200, 1201, 3 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Port of Mobile*, 2 Am. Electl. Cas. 79, 127 U. S. 640, 645, 32 L. Ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. Ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Lyng v. Michigan*, 135 U. S. 161, 166, 34 L. Ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 104, 113, 34 L. Ed. 391, 394, 10 Sup. Ct. Rep. 881; *Crutcher v. Kentucky*, 141 U. S. 47, 58, 35 L. Ed. 649, 652, 11 Sup. Ct. Rep. 851; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 41 L. Ed. 683, 695, 17 Sup. Ct. Rep. 305.

Third. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory, and employed in interstate commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293, *sub. nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. Ed. 164, 167; *Delaware Railroad Tax*, 18 Wall. 206, 232, *sub. nom. Minot v. Philadelphia, W. &*

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B. R. Co., 21 L. Ed. 888, 896; *Western U. Teleg. Co. v. Texas*, 1 Am. Electl. Cas. 373, 105 U. S. 460, 464, 26 L. Ed. 1067, 1068; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 211, 29 L. Ed. 158, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Western U. Teleg. Co. v. Atty. Gen.*, 2 Am. Electl. Cas. 57, 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961; *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 123, 32 L. Ed. 94, 96, 8 Sup. Ct. Rep. 1037; *Leloup v. Port of Mobile*, 2 Am. Electl. Cas. 79, 127 U. S. 640, 649, 32 L. Ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Atty. Gen. v. Western U. Teleg. Co.*, 3 Am. Electl. Cas. 20, 141 U. S. 40, 35 L. Ed. 6, 28, 11 Sup. Ct. Rep. 889; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 6 Am. Electl. Cas. 21, 163 U. S. 1, 41 L. Ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 41 L. Ed. 683, 695, 17 Sup. Ct. Rep. 305.

Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, provided, at least, the franchise is not derived from the United States. *Delaware Railroad Tax*, 18 Wall. 206, 232, *sub. nom. Minot v. Philadelphia, W. & B. R. Co.*, 21 L. Ed. 888, 896; *Postal Teleg. Cable Co. v. Adams*, 5 Am. Electl. Cas. 636, 155 U. S. 688, 696, 39 L. Ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 437, 39 L. Ed. 1043, 1045, 15 Sup. Ct. Rep. 896; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766; *Western U. Teleg. Co. v. Taggart*, 6 Am. Electl. Cas. 21, 163 U. S. 18, 41 L. Ed. 49, 55, 16 Sup. Ct. Rep. 1054; *Western U. Teleg. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. —, 23 Sup. Ct. Rep. 730.

Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private,

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without liability to charge therefor. *Western Union Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. Rep. 732; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. Rep. 313; *Ouachita & M. River Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; *St. Louis v. Western U. Teleg. Co.*, 4 Am. Electl. Cas. 102, 148 U. S. 92, 37 L. Ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. Ed. 810, 13 Sup. Ct. Rep. 990; *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. Ed. 399, 15 Sup. Ct. Rep. 356; *Richmond v. Southern Belt Teleph. & Teleg. Co.*, 7 Am. Electl. Cas. 788, 174 U. S. 761, 771, 43 L. Ed. 1162, 1167, 19 Sup. Ct. Rep. 778.

The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision, such as was presented in *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. Rep. 204, where we said:

"This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and, as such, not in itself obnoxious to the clause of the constitution relied on."

Following that decision, we hold that the city of Philadelphia had power to pass such an ordinance as this, requiring the company to pay a reasonable license fee for the enforcement of local governmental supervision. In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision

for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.

But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True, it is often said that a license tax is, in its nature, arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed, or its profitableness. But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible; and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

Now, the license in question is, as stated, confessedly not for the purpose of raising revenue. Indeed, if it were, as it appears by the affidavit of defense that the company had paid all taxes charged upon its property as property, it might be obnoxious to a complaint of double taxation. It is not like the tax in *Postal Teleg. Cable Co. v. Adams*, 5 Am. Electl. Cas. 636, 155 U. S. 688, 39 L. Ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360, which, although called a privilege tax, was in fact a property tax, and the only property tax upon the company, in respect to which we said (p. 696, L. Ed. p. 315, Inters. Com. Rep. p. 13, Sup. Ct. Rep. p. 270):

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"Doubtless no State could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We pass, therefore, to consider the question of the reasonableness of this license charge. *Prima facie*, it was reasonable. *Western Union Teleg. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. Rep. 204. It devolved upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed. In support of this action, it is contended that the question of reasonableness was one to be determined by the court, and not by the jury, and, further, that there was no testimony from which either a court or jury could find that the charge was unreasonable.

It may be conceded that, generally speaking, whether an ordinance be reasonable is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations (4th ed. vol. 1, sec. 327): "Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible." While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet, when it turns on the amount of the license charge, it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony. As said by Mr. Justice SHIRAS, when presiding in the Court of Appeals in the Third Circuit, in a similar case (*Philadelphia v. Western U. Teleg. Co.*, 32 C. C. A. 246, 253, 60 U. S. App. 398, 413, 89 Fed. 454, 461):

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"When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. . . . Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulations and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in *Cooley*, Const. Lim. (ed. 1886), p. 242, may be safely adopted: 'A municipal corporation may impose, under the police power, such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby incurred.'"

It is urged by the city that, inasmuch as the license fees here charged are the same as those charged by the borough of New Hope, the validity of which was sustained in *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. Rep. 204, it necessarily follows that the charges here imposed are reasonable. But this is a mistake. What is reasonable in one municipality may be oppressive and unreasonable in another. "In determining this question, the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country." 1 Dill. Mun. Corp., 4th ed. sec. 327.

The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. After a careful review of the evidence, we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters pre-

sented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable. Without noticing all the evidence, we content ourselves with these matters. On January 6, 1881, an ordinance was passed by the city councils imposing a license fee of \$1 for each and every telegraph pole erected or maintained in the city. Another ordinance, of date March 30, 1883, regulating underground conduits, wires and cables, and providing for license charges for underground and overhead wires, imposed an annual license charge of \$2.50 per mile of wire for overhead telegraph wires, and \$1 per mile for underground wires. Upon these ordinances the claim was made against the company. On August 5, 1886, a further ordinance was passed, removing all charges upon underground wires. The chief of the electrical bureau of the city, without objection, testified that the removal of all charges on underground wires in 1886 was "as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge connected with it. It was to remove all license charges, to have them place their wires underground." There was evidence of the expenses of the electrical bureau for the years in question, and that such electrical bureau supervised all electrical work upon the streets, but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles, although there was evidence of the general manner in which the electrical bureau conducted its work of supervision and the matters which came within the scope of its attention. On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance and supervision, which, for the years from 1885 to 1891, inclusive, amounted to only \$1.60 3-7 per mile. There was also proof of the number of electric light lamps, poles, and miles of wire within the city, and other kindred facts.

Now, the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for

supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair and supervision by the company was, during the years in question, less than one-half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was \$2.50, and of underground wire \$1, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the electrical department declared, so taken away for the purpose of inducing the removal of overhead wires and placing them all underground, a jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put them in conduits. We do not say that a city has not, by virtue of its police powers, authority directly to compel the removal of wires from poles to conduits, but it may be questionable whether a city can seek the same results by an excessive and unreasonable charge upon overhead wires. We think, therefore, the court erred in withdrawing the case from the jury.

Before concluding, we repeat that we are not intending to express any opinion as to the effect of the testimony as a whole, or to intimate what the verdict of a jury ought to be, nor do we mean to imply that there must be satisfactory evidence of the actual cost of supervision. All we mean to decide is that there was sufficient testimony to go to the jury, and obtain its judgment whether the ordinance passed by the city, and the charges imposed thereby, were, considering all the circumstances of the case, reasonable or oppressive.

The judgment is reversed, and the case remanded, with instructions to set aside the verdict and grant a new trial.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice McKENNA concurred in the judgment.

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WESTERN UNION TELEGRAPH CO. v. VILLAGE OF WAKEFIELD.

Nebraska; Supreme Court.

1. OCCUPATION TAX ON TELEGRAPH COMPANY.—A village may impose a reasonable occupation tax upon telegraph companies doing business within the village, which have complied with the Telegraph Law adopted by Congress in 1866 (Act July 24, 1866, ch. 230; 14 Stat. 221). Such tax should be so restricted as to not include any interstate business, or business of the government of the United States, transacted by such company. Where such ordinance imposes a tax on the business of such company transacted for the government of the United States, it is in violation of the provisions of the Constitution of the United States, and, therefore, void. *Western Union Telegraph Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698, examined, approved and distinguished.

SULLIVAN, C. J., dissenting.

(Syllabus by the court.)

Commissioners' opinion. Department No. 2. Error brought by defendant from judgment for plaintiff.

R. E. Evans and Wright, Call & Hubbard, for plaintiff in error.

John H. Brown, for defendant in error.

Opinion of OLDHAM, C.:

This is an action instituted by the village of Wakefield, Neb., for the purpose of collecting an occupation tax imposed by an ordinance of said village on the Western Union Telegraph Company. The section of the ordinance on which this cause of action is founded is as follows: "Every person, copartnership or corporation who shall engage in the business or occupation of receiving, delivering or transmitting messages by electricity between points within the State of Nebraska, and the village of Wakefield, and person or corporation owning or operating lines for the transmission of messages by wire between such points and who shall maintain in the said village an office for the receiving, transmission and delivery of such messages either by telegraph or telephone shall pay to the treasurer of the village of Wakefield

a license tax of \$20.00 at such times as are provided in section 2 of this ordinance for the payment of license taxes."

The petition alleges the incorporation of the village, the passage and publication of the ordinance, the levy of a tax under its provisions, and the failure and refusal of the telegraph company to pay the same for the years 1900 and 1901, after proper demand made. Defendant answered this petition, admitting the incorporation of the village, the passage and publication of the ordinance, the levy of the tax, the refusal of defendant to pay the same after a demand properly made, and that defendant was conducting a telegraph office in the village. The answer further alleged, in substance, that the ordinance is wholly void and of no effect, as being a tax levied upon interstate commerce. It then sets out the nature and extent of the business in which defendant is engaged, its compliance with the Telegraph Law enacted by Congress July 24, 1866 (14 Stat. 221, ch. 230), and alleges that, in compliance with this act, "it has constructed its lines of telegraph over the public highways and post roads, including generally the railroads in the United States, and that all of said railroads, including the line of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, running through said village of Wakefield, are post roads of the United States;" that it is engaged in sending and receiving telegrams over its whole system between its office in Wakefield and other places of the United States, and also between the several departments of the government of the United States and their officers and agents; and that the ordinance operates as a tax upon the use of the post roads established by the authority of the United States. It is also alleged that the amount of the tax imposed by the ordinance upon telegraph companies is unreasonable and prohibitive in its nature.

There is no question raised as to the regularity of the passage of the ordinance, it being admitted that villages in this State have the authority to pass ordinances to impose and collect a reasonable occupation tax.

Every question involved in this controversy has been determined by this court in the case of *The Western Union Telegraph*

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Co. v. Fremont, 4 Am. Electl. Cas. 626, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698, except the question as to the reasonableness of the tax imposed, and the question as to whether this ordinance imposes a tax on the business of the government of the United States. The ordinance of the city of Fremont, which was upheld in the case just cited, provided specifically that the tax should not be levied "upon any business or occupation which is interstate or which is done or conducted by any department of the government of the United States or of this State, or any officer of the United States," etc. The opinion in this case was carefully prepared, and the various decisions of the United States Supreme Court on the validity of ordinances and statutes taxing interstate business of telegraph and other companies engaged in interstate commerce are closely examined, and the conclusion is reached that, "while the State cannot tax either the interstate or government business of a telegraph company, it possesses the power to impose a tax upon such business of such company as is carried on wholly within the State, provided such tax is not levied in gross upon State as well as interstate business, but is restricted to intrastate business solely." While a motion for a new trial was pending in this case, the Supreme Court of the United States, in the case of *Postal Tel.-Cable Co. v. Charleston*, 5 Am. Electl. Cas. 696, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871, announced a decision on the validity of an ordinance imposing an occupation tax similar in nature to that imposed by the city of Fremont, which fully sustained the conclusion reached by this court as to the validity of such an ordinance.

If the ordinance in controversy had contained a clause specifically excluding from its operation interstate business and business transacted for the government of the United States by the telegraph company, we would then only need to examine the question of the reasonableness of the tax imposed by the ordinance, which we would not regard as a very serious question. Unfortunately, no such clause is in the ordinance now before us; the provision being that "every person, copartnership or corporation who shall engage in the business or occupation of receiving, delivering or

transmitting messages by electricity between points within the State of Nebraska, and the village of Wakefield, and person or corporation owning or operating lines for the transmission of messages by wire between such points and who shall maintain in the said village an office," etc., "shall pay," etc. While we think this ordinance would, by its terms, fairly exclude all interstate business of the company, yet we cannot say that it does exclude business of the government of the United States transacted by the company through its officers within the State. This being true, it takes the instant case without both the letter and the reason of the rule announced in *Western Union Tel. Co. v. Fremont*, *supra*, and *Postal Tel. Cable Co. v. Charleston*, *supra*.

As we are thus confronted with a Federal question that this court has not as yet passed upon, we must look for its correct solution to the decisions of the Supreme Court of the United States, where the rule seems to be well settled.

In the first place, it is settled that where a statute of a State or an ordinance of a city, properly enacted, imposes a tax on the receipts of a telegraph company which has complied with the provisions of the act of Congress of 1866, and such tax can be separated between the receipts of the company for interstate and government business, and the receipts from business transacted within the State, the tax will be upheld on intrastate business alone, and the right to impose the tax will be denied as to the United States and interstate business. *Ratterman v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 68, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

With reference to an occupation tax laid in general terms upon a telegraph company, acting under the Telegraph Law passed by Congress in 1866, it is held that such tax is unconstitutional and void. *Leloup v. Mobile*, 2 Am. Electl. Cas. 79, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311. This case, however, was examined and distinguished by SHIRAS, J., in *Postal Tel. Cable Co. v. Charleston*, *supra*, and held not to apply to an ordinance imposing an occupation tax upon a telegraph company engaged in interstate

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business which contained a specific provision not including any business done to or from points without the State, and not including any business done for the government of the United States, its officers or agents.

As already indicated, we think the ordinance now before us fairly excludes from its operation taxes imposed on interstate business, and, so far as that objection is concerned, it can be sustained, under the rule announced in *Western Union Tel. Co. v. Mass.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and in *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035. If the ordinance had specifically excluded from its provisions all business of the United States, we would not hesitate to proclaim its validity, but for failing to do so, we think it fatally defective. Being an occupation tax which is not susceptible of division, it operates as a regulation on all business within the scope of its provisions; and, so far as it includes government messages, it is a tax by the municipality "on the means employed by the government of the United States to execute its constitutional powers, and therefore void. It was so decided in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, and has never been doubted since." *Western Union Tel. Co. v. Texas*, *supra*.

It is, therefore, recommended that the judgment of the District Court be reversed, and the cause remanded.

BARNES and POUND, CC., concur.

PER CURIAM:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded.

Dissenting opinion by SULLIVAN, C. J.:

The village undertook to tax persons or corporations engaged in the "business or occupation of receiving, delivering or transmitting" messages between Wakefield and other points of this State. It does not appear that the handling of government messages constituted any part of such business for the year ending May 1, 1901. The tax in question was therefore, in truth and in fact, a burden upon private intrastate business, and upon that only. The tax being laid upon the business of "receiving, delivering or trans-

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mitting," and not upon the business of standing ready to receive, deliver and transmit, I cannot understand how the bare fact of having accepted the provisions of the act of Congress can constitute a defense. Had the tax been imposed upon the business of maintaining an office at Wakefield, the position taken by the commissioners and approved by the court would doubtless be tenable. But in the absence of any showing that the sending or receiving of government messages constituted a part of the defendant's business at Wakefield, I cannot agree to the conclusion that it has been taxed on account of being engaged in a business in which it was to some extent acting as a government agency.

License Fees for Use of Streets and Highways.

1. Authority to impose.
2. Tax on poles and lines.
3. Charge in the nature of rental.
4. Company having right of occupation.
5. Fee must be reasonable.
 - a. In general.
 - b. Reasonableness, how determined.
 - c. Amount deemed reasonable.

1. Authority to impose.—In the exercise of its police power and its statutory control over streets and highways, a municipal corporation may, by ordinance, impose a reasonable license fee upon telegraph and telephone companies for the use of such streets and highways for the maintenance and operation of their lines.

GEORGIA: *Southern Bell T. & T. Co. v. Stewart*, 109 Ga. 80, 35 S. E. 73.

KANSAS: *In re Chipchase*, 6 Am. Electl. Cas. 92, 56 Kan. 357, 43 Pac. 264.

MARYLAND: *Postal Telegraph Cable Co. v. Baltimore*, 5 Am. Electl. Cas. 37, 79 Md. 502, 29 Atl. 819.

MICHIGAN: *Saginaw, City of, v. Swift Elect. L. Co.*, 113 Mich. 660, 72 N. W. 6.

NEW YORK: *City of Philadelphia v. Postal Telegraph Co.*, 4 Am. Electl. Cas. 92, 67 Hun, 21, 21 N. Y. Supp. 556.

PENNSYLVANIA: *Philadelphia v. American Union Telegraph Co.*, 6 Am. Electl. Cas. 85, 167 Pa. St. 406, 31 Atl. 628; *Newcastle v. Elect. Co.*, 6 Am. Electl. Cas. 87, 16 Pa. Co. Ct. Rep. 663; *Allentown v. W. U. Tel. Co.*, 4 Am. Elect. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070; *Chester, City of, v. W. U. Tel. Co.*, 2 Am. Electl. Cas. 93, 3 Lane. Law Rev. 164; *Lancaster v. Edison Elect. Ill. Co.*, 2 Am. Electl. Cas. 116, 8 Pa. Co. Ct. Rep. 178; *W. U. Tel. Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wkly. Notes Cas. 39.

TENNESSEE: *W. U. Tel. Co. v. Tenn.*, 1 Am. Electl. Cas. 326, 9 Baxt. 509.

VIRGINIA: *W. U. Tel. Co. v. City of Richmond*, 1 Am. Electl. Cas. 149, 26 Grat. 1.

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If the basis of the fee is made the amount of business done by the company within the State, the question as to whether or not it is an interference with interstate commerce is of importance; unless it can be clearly established that the fee in such cases is for the business exclusively transacted within the State the ordinance imposing it cannot be sustained. *City Council of Charleston v. Postal Telegraph Cable Co.*, 3 Am. Electl. Cas. 56; *Ogden City v. Crossman & Rocky Mt. Bell Telephone Co.*, 17 Utah, 66, 53 Pac. 985.

In the case of *Moore v. City of Eufaula*, 4 Am. Electl. Cas. 615, 97 Ala. 670, 11 So. 921, a municipal ordinance requiring each telegraph company having an office or place of business within the city and engaged in the transmission of messages between points within the State, to pay a license tax, was held not in conflict with the interstate commerce provisions of the Federal Constitution, or void as to a telegraph company which has accepted the provisions of the Post Roads Act of Congress. But in the case of *San Francisco v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 594, 96 Cal. 140, 31 Pac. 10, it was held that a telegraph company which has accepted the provisions of the Post Roads Act of Congress is an executive instrument of the national government and is, therefore, not subject to taxation upon its franchise. State and municipal authorities are powerless to impose a tax upon messages to or from other States since such a tax would be in conflict with the interstate commerce provision of the Federal Constitution; but where a telegraph company is engaged in both interstate and intrastate business an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the State is not repugnant to such constitutional provision. *W. U. Tel. Co. v. Fremont*, 4 Am. Electl. Cas. 626, 39 Neb. 692, 26 L. R. A. 698.

It is well settled that the State cannot authorize a municipality to impose any charge whether in the nature of a license fee, privilege, business or occupation tax, or a tax for revenue, or under any other name, where such fee or tax covers or includes the business done by a telephone or telegraph company in the transmission of messages from one State to another.

2. Tax on poles and wires.—A number of cases have arisen under ordinances imposing a license fee upon telegraph and telephone companies, based upon the number of poles and the length of the wires within the municipality. Such a fee is justifiable where it is shown that it is for the purpose of compensating the municipality for the use of the street by the company. The existence of poles and wires in the streets is to a certain extent a menace to the public safety, and frequent inspections are required of the municipal authorities, so that the danger may be minimized. If the fee is based upon the reasonable cost of such inspection it loses its character as a tax upon business, and cannot, therefore, be deemed an interference with interstate commerce. In the following cases license fees imposed upon telegraph and telephone companies determined by the number of poles and the length of the wires in the streets have been sustained: *Allentown v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070; *Chester v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 100, 154 Pa. St. 464, 25 Atl. 1134; *Borough of Phillipsburgh v. Central Pennsylvania Telephone & S. Co.*, 2 Am. Electl. Cas. 105, 22 Wkly. Notes Cas. 572; *Postal Telegraph Cable Co. v. Baltimore*, 5 Am. Electl. Cas.

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37, 79 Md. 502, 29 Atl. 819; *Harrisburg v. Pennsylvania Telephone Co.*, 5 Am. Electl. Cas. 63, 15 Pa. Co. Ct. Rep. 518; *Philadelphia v. Postal Telegraph Cable Co.*, 4 Am. Electl. Cas. 92, 67 Hun, 21, 21 N. Y. Supp. 556; *Mutual Union Telegraph Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wkly. Notes Cas. 39.

In the case of *City of Philadelphia v. W. U. Tel. Co.*, 3 Am. Electl. Cas. 52, 40 Fed. 616, it was held, while a municipal corporation cannot impose a tax upon telegraph companies, it is its duty to subject them to such conditions, restrictions and supervision as are necessary to the public safety; and consequently it may impose such charges as will enable it to perform such duty without loss to itself.

3. Charge in the nature of rental.—A municipal ordinance requiring the payment of a fixed sum for each telegraph or telephone pole maintained in the streets does not impose a privilege or license tax. It is in the nature of a rental. Such charge is not forbidden upon common-law principles, nor by the fact that the poles belong to a telegraph company which has accepted the provision of the Post Roads Act of Congress. The privilege granted by that statute is, like any other franchise, to be exercised in subordination to public and private rights. *St. Louis v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 102, 148 U. S. 92, 13 Sup. Ct. 485.

4. Company having right of occupation.—Where a telegraph company has by statute a right to the use of a street without charge, a municipal corporation cannot impose a license fee upon such company. *Hodges v. Western Un. Teleg. Co.*, 5 Am. Electl. Cas. 56, 72 Miss. 910, 18 So. 84. Where a telegraph company is occupying the streets of a city under a franchise reserving to the city the right to use the top arms of the poles of the company, it has been held that, the conditions imposed having been accepted by the company, the city could not exact from the company a rental charge for the use of the streets. *St. Louis v. Western Un. Teleg. Co.*, 5 Am. Electl. Cas. 43. In the case of *Wisconsin Teleph. Co. v. Oshkosh*, 1 Am. Electl. Cas. 687, 62 Wis. 32, 21 N. W. 828, a municipal ordinance, exacting a license fee of a telephone company as a condition of its maintaining its poles and wires along the streets of a city, which was expressly authorized by a State statute, was held in conflict with such statute and void.

A contract entered into between a municipality and an electric corporation, for the lighting of its streets, carries with it the implied right to erect the necessary poles and wires in the streets for the purpose of carrying out the contract; and the city cannot impose a tax or license fee on any poles or wires used exclusively for such purpose. *New Castle v. Electric Co.*, 6 Am. Electl. Cas. 87, 16 Pa. Co. Ct. Rep. 663.

5. Fee must be reasonable.—*a. In general.*—The validity of the fee imposed will depend largely upon its reasonableness. It must not be so large as to evidence an intention to derive revenue from its exaction; nor must it be of such a nature as to indicate a purpose to harass, impede, or prevent interstate commerce. *Postal Teleg. Cable Co. v. Baltimore*, 5 Am. Electl. Cas. 37, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161; *Chester v. Western Un. Teleg. Co.*,

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2 Am. Electl. Cas. 93, 3 Lanc. Law Rev. (Pa.) 164; *Lancaster v. Edison Ill. Co.*, 2 Am. Electl. Cas. 116, 8 Pa. Co. Ct. Rep. 178; *Western Un. Teleg. Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wkly. Notes Cas. 39, 12 Atl. 144.

b. Reasonableness, how determined.—Whether or not a license fee is reasonable is a question of law, to be determined by the court. *Chester v. Western Un. Teleg. Co.*, 2 Am. Electl. Cas. 93, 3 Lanc. Law Rev. (Pa.) 164. It is apparent from the cases determining the reasonableness of license fees that much depends upon the nature and character of the business licensed, the extent of the privileges enjoyed, and burdens borne, and of the expenses, necessities and indebtedness of the municipal or other local government, imposing such fee. It seems, also, from an examination of the decisions covering telegraph poles, or otherwise relating to telegraph companies, that the use of the streets of a populous city might justify, perhaps in a greater degree, the exercise of the police power in this respect, than would the use of streets in a small town, where every conceivable use to which the public streets may be put is not exacted, but the demands of commerce and traffic are few. Joyce, on Electrical Law, sec. 100.

It is a well established rule that in all matters pertaining to the police regulation of municipalities their ordinances, being of the nature of legislative discretion, are *prima facie* reasonable. In the matter of licensing trades and avocations, and fixing the amount of permissible taxes therefor, the action of the governing board of a municipality is presumably honest and just. But this presumption is not absolute; the reasonableness of an ordinance imposing a license fee is not exclusively within the discretion of the governing board: the inquiry is at all times open in the courts. *St. Louis v. Western Un. Teleg. Co.*, 5 Am. Electl. Cas. 43 (U. S. Cir. Ct., E. D. Mo.) And it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the municipality. *St. Louis v. Western Un. Teleg. Co.*, 4 Am. Electl. Cas. 102, 148 U. S. 92.

A municipality is bound to subject telegraph and telephone companies to such proper conditions, restrictions and supervision, respecting their lines within its limits, as are necessary to public safety, and consequently to such charges as will enable it to perform its duty without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise not. *City of Philadelphia v. Western Un. Teleg. Co.*, 3 Am. Electl. Cas. 52, 40 Fed. 616.

c. Amount deemed reasonable.—In the case of *Allentown v. Western Un. Teleg. Co.*, 4 Am. Electl. Cas. 90, 148 Pa. St. 117, 23 Atl. 1070, the court held that the amount of the fee is discretionary with the municipal authorities, and the court will interfere only in case of abuse of discretion. In this case a fee of \$1 per annum per pole, and \$2.50 per annum for each mile of wire, was held reasonable. A similar fee was sustained in *Chester v. Western Un. Teleg. Co.*, 4 Am. Electl. Cas. 100, 154 Pa. St. 464, 25 Atl. 1134, and *Western Un. Teleg. Co. v. Philadelphia*, 2 Am. Electl. Cas. 98, 22 Wkly. Notes Cas. (Pa.) 29. In the case of *Postal Teleg. Co. v. Baltimore*, 5 Am. Electl. Cas. 37, 79 Md. 502, 29 Atl. 819, a fee of \$2 per year for each pole in the city of Balt-

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more was held reasonable. In Kansas a license fee of \$12 a year for each business telephone, and \$10 for each residence telephone was sustained in the absence of proof that the privileges enjoyed and burdens borne by the company, and the expenditures and necessities of the city, did not warrant it. *In re Chipchase*, 6 Am. Electl. Cas. 92, 56 Kan. 357, 43 Pac. 264. In *Ogden v. Crossman & Rocky Mt. Bell Teleph. Co.*, 17 Utah, 66, 53 Pac. 985, it was held that a municipality might provide by ordinance for levying and collecting a license fee of \$5 for each telephone operated and maintained by a telephone company, and used exclusively within its limits, for which a rental charge is made for local business.

In the case of *Saginaw v. Swift Elect. Light Co.*, 113 Mich 660, 72 N. W. 6, it was held that an ordinance of a city charging an electric light company with 50 cents per annum for each pole maintained by it, to cover the cost of inspection by the city, is unreasonable, where the actual cost of such inspection is less than 5 cents per pole.

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TAXATION GENERALLY OF TELEGRAPH AND TELEPHONE COMPANIES.

STATE EX REL. GOTTLIEB V. WESTERN UNION TELEG. CO.

Missouri; Supreme Court.

1. **TAXATION OF TELEGRAPH COMPANIES; EFFECT OF U. S. STATUTE.**—While a telegraph company under the act of Congress, July 14, 1866 (U. S. Rev. Stats. sec. 5263), is a government agency and an instrument of interstate commerce, its tangible property within a State is subject to State taxation, like all other property. In determining the value of the tangible property of such a company, it is proper to compare the length of its lines in such State with that of its entire lines, or to take the aggregate value of the shares of its capital stock, and deduct therefrom such portion of that valuation as is proportional to the length of its lines without the State, and also to deduct therefrom the value of its real estate and machinery subject to local taxation within the State. Taxes so assessed constitute an excise tax upon the property or capital of the corporation, and not a tax upon any franchise belonging to it.
2. **TAXATION OF FRANCHISE OF COMPANY.**—A franchise is not conferred upon a telegraph company by the act of Congress, 1866 (U. S. Rev. Stat. sec. 5263) where such company was incorporated under State laws and merely accepted the privileges conferred by the act referred to. The fact that it is an instrument of interstate commerce, or that it has accepted privileges as such, did not exempt its property from State taxation. Its franchise is taxable in the State where its lines are located, either directly, in the proportion that portion of its franchise exercised in such State bears to the portion exercised in all States, or indirectly, by being impressed upon the tangible property owned by it in the State, thereby increasing its value, and by considering its franchise and its tangible property as a system, and then assessing the part thereof within the State at its proportionate value to that of its entire system.

Appeal by both parties from judgment determining tax against defendant.

Decided December 3, 1903; reported 65 S. W. 775.

H. M. Meriwether, Eugene Slevin, Atty. Gen., and Sam. B. Jeffries, for plaintiff.

Dickson & Smith and Karnes, New & Krauthoff, for defendant.

Opinion by MARSHALL, J. [omitting part of opinion relating to powers of State board of equalization, etc.]

2. The trial court held that the item, "All other property at \$856,400.56," included franchises which were derived from the Federal government, and were nontaxable by reason of such derivation, and that the defendant is a governmental agent and an instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority; and hence held that the portion of the tax sought to be recovered which was based upon this item could not be legally charged on defendant. From this the plaintiff appealed. The defendant is a corporation organized under the laws of the State of New York. It has never received any authority or right or permission from the State of Missouri to do business in this State, or to erect its poles or string its wires on, over, or upon the public highways and places in this State. Ever since 1865 (Gen. St. 1866, c. 65, p. 349, sec. 5) there has been a statute in this State authorizing any telegraph company organized under the laws of this State to place its poles and wires along, over, and upon the public highways. But there is not now, and never has been, any law of this State granting any such franchise or permission to any foreign telegraph company. The defendant's sole right to do business in Missouri arises out of the Act of Congress approved July 14, 1866 (14 Stat. pp. 221, 222). Briefly stated, that act gives the defendant the right to maintain its system of telegraph along the military and post roads of the United States, and over, under, and across all navigable streams of the United States, and requires the defendant to transmit and give priority to messages of the government between its various departments, officers, and agents at rates to be annually fixed by the postmaster-general, and further requires the defendant to sell its entire system to the government at any time upon a valuation to be fixed by appraisers. The defendant accepted the provisions of this act, and has ever since been operating under it. But while this act has been held to be a legitimate regulation of commerce between the States, and to constitute the defendant, as to government business, a government agency and an instrument of interstate commerce

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(*Pensacola Tel. Co. v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 250, 96 U. S. 1, 24 L. Ed. 708; *Western Union Tel. Co. v. Texas*, 1 Am. Electl. Cas. 373, 105 U. S. 460, 26 L. Ed. 1067), nevertheless it is equally as well established that "the property of a telegraph company within a State is subject to State taxation, like all other property. The fact that the company is engaged in interstate commerce, or that it is an agent of the government, can afford no immunity from the taxation of its property." 25 Am. & Eng. Enc. Law (1st ed.), p. 873, and cases cited; *Western Union Tel. Co. v. Texas*, 1 Am. Electl. Cas. 276, 105 U. S. 464, 26 L. Ed. 1067; *Western Union Tel. Co. v. Taggart*, 6 Am. Electl. Cas. 621, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; and *Atty. Gen. of Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628. The plaintiff relies principally upon the cases of *Western Union Tel. Co. v. Massachusetts*, 2 Am. Electl. Cas. 57, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and *Atty. Gen. of Massachusetts v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 40, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628. The syllabi in those cases express clearly the points decided. In the first case (2 Am. Electl. Cas. 57, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790), the syllabus is as follows:

"The privilege conferred upon telegraph companies by Rev. St. sec. 5263, carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph. The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. St. sec. 5263, nor by the commerce clause of the Constitution. The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust. A State statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has accepted the provisions

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of Rev. St. sec. 5263, from operating its lines over military and post roads of the United States."

In the second case (3 Am. Electl. Cas. 40, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628), the syllabus is as follows:

"The tax imposed by the statutes of Massachusetts (Pub. St. ch. 13, secs. 40, 42), requiring every telegraph company owning a line of telegraph within the State to pay the State treasurer 'a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock,' deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is, in effect, a tax upon the corporation on account of property owned and used by it within the State, and is constitutional and valid, as applied to a telegraph company incorporated by another State, and which has accepted the rights conferred by Congress by section 5263 of the Revised Statutes."

It will thus be observed that in the first case it was held proper to tax the tangible property of the company in that State, and that "the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines." And in the second case it was held proper to require the company to pay "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," "deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State." This method of taxation was expressly authorized by the statute of that State. It was argued in the last case cited that such a tax was a tax upon its right or franchise derived from the Act of Congress, and hence was a tax on its franchise, and not on its property. But the Supreme Court of the United States held that such a method of taxation was not a tax on its franchise, but was only a method to ascertain the value of the tangible property located in the State of Massachusetts. Mr. Justice Gray, delivering the opinion of the court, said:

"But this court, in answering that argument and upholding the validity of the tax, affirmed the following propositions: The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived,

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not from the act of Congress, but from the laws of the State of New York, under which it was organized; and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to the support of the government of that State. 2 Am. Electl. Cas. 57, 125 U. S. 547, 548, 8 Sup. Ct. 963, 31 L. Ed. 793. By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. 2 Am. Electl. Cas. 57, 125 U. S. 547, 8 Sup. Ct. 963, 31 L. Ed. 793. The tax, though nominally upon the shares of capital stock of the company, is, in effect, a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution. 2 Am. Electl. Cas. 57, 125 U. S. 552, 8 Sup. Ct. 965, 31 L. Ed. 794. The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State, and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 2 Am. Electl. Cas. 57, 125 U. S. 553, 8 Sup. Ct. 965, 31 L. Ed. 794. That decision was cited by the court in *Ratterman v. Telegraph Co.*, 2 Am. Electl. Cas. 68, 127 U. S. 411, 426, 427, 8 Sup. Ct. 1127, 32 L. Ed. 229, and in *Leloup v. Port of Mobile*, 127 U. S. 640, 649, 8 Sup. Ct. 1380, 32 L. Ed. 311."

The rules established by the adjudications may be stated to be: First, that the Western Union Telegraph Company is, as between governmental departments, a governmental agency, but is not so as between the company and a State or a citizen; second, that the telegraph company is an instrument of interstate commerce, and has a right to enter a State and transact business; third, that, the telegraph company being an instrument of interstate commerce, and deriving its powers in this regard from the United States, no State has a right to prevent such company from doing business in the State, for that would be an interference with interstate com-

merce; fourth, that the tangible property of the telegraph company located in a State is subject to taxation like any other property in that State, and its franchise or right derived from the act of 1866 does not exempt such property from taxation by the State in which such property is located; fifth, that in determining the value of the tangible property of the company located in any State it is proper to compare the length of its lines in that State with the length of its entire lines, or to take the aggregate value of the shares of its capital stock, and deduct therefrom such portion of that valuation as is proportional to the length of its lines without the State, and also to deduct therefrom the value of its real estate and machinery subject to local taxation within the State. And that such taxes so assessed constitute an excise tax upon the property or capital of the corporation, and not a tax upon any franchise of the corporation. In the case at bar the board of equalization first ascertained the number of miles of poles and wire and the number of instruments owned by the defendant, and used in this State, and placed a valuation upon them. The board then considered "all other property" owned by the defendant located in this State, and put a valuation upon that. The defendant's evidence shows that it did own other property in this State besides the poles, wire, and instruments specially enumerated and valued. But it contends that such other property was worth only \$1,000, and not \$856,400.56, as the board found it to be worth. The utmost that could, therefore, be said of this item is that the defendant and the board differed in opinion as to the value of such other property, and, this being an action at law, wherein the defendant attempts to defeat the whole levy, as long as it appears that the defendant owned some property, and the only question is whether it was of the one value or the other, the defense must fail, for a court of law has no machinery for determining how much such property was really worth; and, in addition, if all defendant claims be true, it is merely a case of overvaluation, and not an erroneous assessment, and under the law of this State mere overvaluation is no defense to a suit upon a tax bill, for section 7579, Rev. St. 1889 (section 9197, Rev. St. 1899), expressly provides that "valuations placed on property by the as-

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essor or board of equalization shall not be deemed to be erroneous assessments under this section."

But, aside from this, such a defense is not available to the defendant in a suit upon the tax bill in a court of law, but "an aggrieved party may resort to a court of equity to restrain the effect of the excess upon payment or tender of what is admitted to be due." *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 111, 11 L. Ed. 1000. This the defendant has wholly failed to do. The defendant admits it owns some property that is subject to taxation other than that specifically enumerated, and it has not sought the aid of a court of equity to relieve it against the claimed excessive tax. It has paid or offered to pay the tax upon the other property it admits it owns, even upon its own basis of valuation thereon. That, even if this was an appropriate proceeding in equity, the defendant has not brought itself within the rule entitling a party to relief as laid down by the Supreme Court of the United States. The defendant, however, contends, and the trial court found, that the other property at \$856,400.56 "included franchises which were derived from the Federal government, and were nontaxable on the reason of such derivation, and that the defendant is a governmental agent and an instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority, and hence that court held that the portion of the tax base attributable to this item of assessment could not be recovered. The trial court was right in holding that the defendant is a governmental agent, but this only extended to its relations between the government and its agent. The trial court was also right in holding that the defendant is an instrument of interstate commerce. But the trial court was in error in holding that the defendant derived its franchises—that is, its right to exist and be a corporation and do a taxable business—from the government of the United States. The franchise is derived from the State of New York, and not from the government of the United States. Neither the Act of Congress of 1866 nor its acceptance by the defendant created the defendant or gave it the right to do business. The defendant was created by the laws of New York 12 years before the Federal statute

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acted. The defendant was obliged to be a telegraph company or engaged in that business before it could accept the provisions of that act. It could not be created a telegraph corporation by the government of the United States, or, at any rate, it had not been so created. The fact that it is an instrument of interstate commerce, or that it had accepted the Act of 1866, did not exempt its property in this State from taxation. 25 Am. & Eng. Enc. Law (1st ed.), p. 873; *Western Union Tel. Co. v. Texas*, 1 Am. Electl. Cas. 373, 105 U. S. 464, 26 L. Ed. 1067; *Western Union Tel. Co. v. Taggart*, 6 Am. Electl. Cas. 621, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Western Union Tel. Co. v. Massachusetts*, 2 Am. Electl. Cas. 57, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Atty. Gen. of Massachusetts v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 40, 141 U. S. 140, 11 Sup. Ct. 889, 35 L. Ed. 628. So that when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration "the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stock and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof," it did not and could not have included therein any franchise derived by the defendant from the government of the United States, because that government had conferred no such franchise; nor was such a valuation placed upon "all other property" a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State; that is, that property was valued not as so many poles, so much wire, so many instruments, or so much "other property" in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which, being brought into relation towards each other—into a system, located partly in this State and partly in other States—gave each part a concrete value, which was much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was

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subject to taxation, either directly, in the proportion that tion of the franchise exercised in this State bore to the pr of the franchise exercised in all other States, or indire was done in Massachusetts and as was done here, by be pressed upon the tangible property owned by it, thereby in its value, and by considering the franchise and its tangil erty as a system, and then assessing the part of the proper ing a part of the system and located in Missouri as of its tionate value of the whole property constituting the syster was expressly held to be proper in *Western Union Tel. Co. achusetts*, 2 Am. Electl. Cas. 57, 125 U. S. 530, 8 Sup. 31 L. Ed. 790. The rule approved in *Atty. Gen. of Mass v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 40, 141 U. S. Sup. Ct. 889, 35 L. Ed. 628, accomplishes the same resu is "a tax upon its corporate franchise at a valuation there to the aggregate value of the shares of its capital stock," d such proportion of that valuation as is proportional to the l its lines without the State, and deducting also an amount the value of its real estate and machinery subject to local within the State. This is only another method of adding t of the franchise to the value of the property located in t and thereby taxing its concrete value, which is its real va the value at which it could be sold. It will not do to say, s fendant does, that the poles, wire, and instruments coul placed new at a cost of \$984,357.89, and that all its other in this State is only worth \$1,000. Those sums may repr value of the property in the abstract, but they do not t the value of the property in the concrete, because as a p system a greater value is necessarily impressed upon the property. and thereby the property becomes, it may be, wo times as much as it would be if considered in the abstr injustice is done to the defendant in so valuing it, becaus fendant so uses it and treats it, and because it is worth mo would sell for more as a necessary part of a system than if it was sold in the abstract, or than if it had no such re the other parts of the system. In other words, the d

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values it for taxation at its abstract value, while it enjoys it and derives profit from it according to its concrete value. It follows that the judgment of the Circuit Court holding that the tax assessed against "all other property at \$856,400.56" to be unlawful is erroneous, and that the plaintiff is entitled to a judgment for the whole amount of the tax sued for.

Judgment is accordingly entered for the plaintiff here for \$1,027.22, back taxes for the year 1899, with interest thereon from the 1st of January, 1900, at the rate of 1 per cent, per month (Rev. St. 1899, sec. 9225), and costs. All concur.

Telegraph lines deemed real property for the purpose of taxation, see *Western Un. Tel. Co. v. Tennessee*, 1 Am. Electl. Cas. 327, 9 Baxt. (Tenn.) 327. But this proposition has been controverted, and there are cases to the effect that poles and wires for conducting electricity are not appurtenant to the land, and are not in a strict sense to be deemed real property. *Shelbyville Water Co. v. People*, 4 Am. Electl. Cas. 559, 140 Ill. 545, 30 N. E. 678. In the case of *Memphis Gas Light Co. v. State*, 6 Cald. (Tenn.) the court said: "Pipes for gas laid through the streets of the city by permission of the corporate authorities, do not become the property of the city, or a part of the realty. They are personal property and the property of the company." To the same effect is *Commonwealth v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75. And see *Newport Ill. Co. v. Tax Assessors*, 6 Am. Electl. Cas. 659, 19 R. I. 632, 36 Atl. 426, holding that dynamos, switch-boards, poles and wires are personal rather than real property for the purpose of taxation under the Rhode Island law.

NEW ENGLAND TELEPHONE & TELEGRAPH CO. V. CITY OF MANCHESTER.

New Hampshire; Supreme Court.

1. TAXATION OF REAL ESTATE OF TELEPHONE COMPANY.—The statute (N. H. Pub. Stats. 1901, ch. 64, sec. 3) imposes a State tax upon the value of the lines of telephone companies within the State, including poles, wires, instruments, apparatus, office furniture and fixtures of all kinds. Section 12 of such statute provides that such companies shall be taxed only in the mode prescribed therein, "except upon real estate not used in their ordinary business." It was held that this statute precluded the local taxation of the real estate of such companies which was used in their ordinary business.

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Petition by plaintiff for abatement of taxes. Decided May 5, 1903; reported (N. H.) 55 Atl. 188.

The plaintiffs are a corporation duly established under the laws of Massachusetts. They operate lines in New Hampshire, and have in this State property consisting of telephones, lines, wires, poles, and other implements and instrumentalities required for conducting their business. Their property in other States is of a similar character, and is used for a similar purpose. The corporate property is wholly represented by capital stock. The plaintiffs own real estate situate on Concord street, in Manchester. The building thereon was designated and erected exclusively for a telephone exchange, and is used solely for that purpose. All wires and connections in Manchester and those leading from Manchester elsewhere are operated in the building, and the engines, dynamos, and other apparatus used in the business are located therein. The building also contains offices, occupied by the local manager and others connected with the company, and a storeroom for supplies used in conducting the business in Manchester and vicinity, and making repairs and renewals, and in providing for new construction. In 1901 the State board of equalization, acting under chapter 64 of the Public Statutes, determined the value of the plaintiff's property in this State for purposes of taxation to be \$320,000, and assessed a tax thereon of \$5,408, which sum was paid to the State treasurer. In the same year the assessors of Manchester assessed a tax upon the plaintiff's real estate on Concord street, and payment of the same was demanded. A petition for abatement was seasonably filed and denied. March 8, 1902, the plaintiffs under protest paid to the city the sum of \$256.26, as the amount of the tax and interest thereon.

Joseph W. Fellows, for plaintiffs.

George A. Wagner, for defendants.

Opinion by REMICK, J.:

The law provides that "every person or corporation owning or operating a telegraph or telephone line within the State shall pay to the State, for its use, an annual tax upon the value, on the first day of April of each year, of the telegraph or telephone line within the State, then owned or operated by such person or corporation, including poles, wires, instruments, apparatus, office furniture, and fixtures of all kinds, at a rate as nearly equal as may be to the average rate of taxation at that time upon other property throughout the State" (Pub. St. 1901, c. 64, sec. 3); and also that "the State board of equalization shall determine the value of the prop-

erty to be taxed by virtue of the preceding sections and the rate of taxation, and shall assess such taxes." Pub. St. 1901, c. 64, sec. 4.

The defendants contend that, as real estate is not specifically mentioned in the foregoing section 3, all the real estate of telegraph and telephone companies is taxable, like real estate generally, in "the town in which it is situate." Pub. St. 1901, c. 56, sec. 14. There might be force to this contention were it not for section 12, c. 64, Pub. St. 1901, which provides that "telegraph and telephone corporations and companies shall be taxed only in the mode prescribed in this chapter, except upon real estate not used in their ordinary business." It is entirely clear, in the light of this section, that the Legislature intended that such real estate of telegraph and telephone companies as is "used in their ordinary business" should be taxed by the State board of equalization for the use of the State, as provided by section 4, c. 64, Pub. St. 1901, and not by the "town in which it is situate," as provided by section 14, c. 56, Pub. St. 1901. As it is found that the real estate in question was owned by the plaintiffs and "used in their ordinary business," it follows that its taxation by the city of Manchester was unlawful, and that the tax should be abated.

Case discharged. All concurred.

Other Cases Relating to Taxation of Telegraph and Telephone Companies.

1. City ordinance imposing license tax on telegraph poles and conduits; constitutionality.—In the case of *Postal Teleg. Cable Co. v. City of Norfolk, Va.*, 43 S. E. 207, an ordinance of the city of Norfolk was under consideration. Such ordinance provided that any corporation engaged in sending telegrams to or from the city of Norfolk to or from points within the State of Virginia, excepting telegrams sent to or received by the government of the United States, or of the State or its agents or officers, shall pay a license tax of \$250, and in addition \$1 for each pole, and \$1 for each 100 feet of conduits on the streets or alleys of the city owned by such person or corporation; another ordinance passed in connection therewith provided that nothing therein contained shall be construed as imposing a tax upon, or restricting, interstate commerce. Such ordinance was held constitutional; it was not in violation of U. S. Const., art. 1, sec. 8, conferring on Congress sole power to regulate commerce between the States; nor was it violative of art. 10, sec. 4, of the Virginia

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Constitution, authorizing the general assembly to levy a tax on business cannot be reached by the *ad valorem* system of taxation.

2. License fee on telephone company for use of city streets for use of street having been granted, new conditions to be imposed.—In the case of *Sunset Teleph. & Teleg. Co. v. City of Medford*, 115 Fed. 202 (Cir. Ct., Dist. Oregon), the plaintiff sought to enjoin the city of Medford from removing its poles and wires from the streets for use of the telephone company, and to pay an annual license fee, imposed by an ordinance of such city. The court said:

"Section 102 of the act of the Legislature incorporating the city of Medford provides that:

"The city council shall have power to license, regulate or prohibit the use of telegraph and telephone companies using the roads, streets or alleys and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall be granted for an exclusive right to any such company."

"The ordinance complained of provides that no person shall engage in telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of \$100. When this sum is paid, the city recorder shall issue a license to the person so paying, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person so paying said license fee, during the year for which they have obtained said license, shall have a right to occupy the streets and alleys with his poles and wires, etc. This is a revenue provision, and is not within the power conferred upon the city by its charter. 'The power to license, as distinguished from regulating a business, implies the power to charge a fee therefor to defray the expense of issuing the license, and to compensate the city for the expense incurred in maintaining such regulation. Whenever it is shown that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void.' *Laundry & Dry Cleaning Co. v. City of New York* (D. C.), 22 Fed. 701. If the city has authority, under section 102 of its charter, to fix the compensation which shall be annually paid for the use or privilege to use the roads and streets of the city, then the city is not required to pay the sum fixed by the ordinance for such use. If it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of the duly appointed officers. If so, the city cannot add new conditions to the license after the company has accepted it and established its plant. If by the ordinance to fix compensation is meant the compensation that the city is to receive from the license regulation, the case is within the rule of the *Laundry & Dry Cleaning Co.* (D. C.), 22 Fed. 701, and the compensation to be fixed must not go beyond the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainant, and while it may exact compensation for the license, it cannot, under the power given in its charter, make the compensation a matter of revenue."

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TAXATION OF ELECTRIC LIGHT COMPANIES.

PATERSON & PASSAIC GAS & ELECT. CO. v. STATE BOARD OF
ASSESSORS.*New Jersey; Supreme Court.*

1. FRANCHISE TAX ON ELECTRIC LIGHT COMPANY.—The Paterson & Passaic Gas & Electric Company was formed March 1, 1899, by the consolidation and merger of eight corporation, some of whom possessed and exercised municipal franchises within the definition laid down in *State Board of Assessors v. Plainfield Water Company*, 67 N. J. Law, 357, 52 Atl. 230, and since its formation the consolidated company has constantly exercised those franchises. *Held*, that the company is subject to taxation under section 4 of the act of March 23, 1900 (P. L. p. 502), for the taxation of franchises.
2. AMOUNT OF TAX.—The tax to be levied on the corporation under that section is 2 per cent. of its gross annual receipts from all its business, not merely 2 per cent. of its receipts from the exercise of municipal franchises.
(Syllabus by the court.)

Certiorari to review assessment against relator. Decided February 24, 1903; reported (N. J. Law), 54 Atl. 246.

R. V. Lindabury and *Hobart Tuttle*, for prosecutor.

Michael Dunn, for defendants.

Opinion by DIXON, J.:

The Paterson & Passaic Gas & Electric Company was formed on March 1, 1899, by the consolidation and merging of the Paterson Gaslight Company, the People's Gaslight Company of the City of Paterson, the Passaic Gaslight Company, the Edison Electric Illuminating Company of Paterson, the Passaic & Bergen Gas Company, the Lodi Light, Heat & Power Company, the Passaic Electric Light, Heat & Power Company, and the Passaic Lighting Company. Under the Corporation Act of 1896, in pursuance of which the merger and consolidation took place, the several corporations became a new single corporation, with a new name, new capi-

tal stock, and new directors, and was (speaking generally) endowed with all the rights and powers, and charged with duties and limitations, of the constituent companies. Under the Act of March 23, 1900, for the taxation of franchises (L. 1900, c. 502), this company, on April 23, 1901, made return to the board of assessors that its gross receipts from its business in the State of New Jersey for the year ending December 31, 1900, amounted to \$572,007.40, whereupon that board assessed against the company at \$11,440.15, and apportioned the tax among the various taxing districts in which the property of the company was located. The present writ of certiorari is prosecuted to reduce that tax.

The ground of the application for reduction is that three constituent companies, namely, the Paterson Gaslight Company, the People's Gaslight Company, and the Passaic Gaslight Company, never exercised any "municipal franchises" within the definition of that phrase given in *State Board of Assessors v. Plainfield Water Company*, 67 N. J. Law, 357, 52 Atl. 23. The prosecutor contends that as, by the terms of the Act of March 23, 1900, it cannot "apply to any corporation which has not hitherto or not hereafter exercise any municipal franchise" (section 8), therefore it cannot apply to the prosecutor, so as to impose a tax on the receipts derived from the business formerly carried on by the constituent companies. This contention plainly ignores the language of the statute. Construing together the first, fourth and eighth sections of the act, it will be manifest that the corporations which are required to make return to the State board are thus described: "Corporations (other than municipal corporations or corporations taxable under the Act of April 10, 1884), which have acquired, or may hereafter acquire, authority or permission from the State or from any county or district thereof, and have or may hereafter have the right to use, and occupy, and occupying, the street or highways, roads, or public places in the State," excluding, however, from such class "any corporation which has not hitherto or not hereafter exercise any municipal franchise." The prosecutor concedes that it is not taxable under the Act of April 10,

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that it acquired from the State, through the charters of the three constituent companies last named, and from certain taxing districts of the State, through the five other constituent companies, authority and permission to use and occupy certain streets and highways in several municipalities of the State; that it is using those streets and highways; and that the franchises passing to it from those five companies, and which it is constantly exercising, were municipal franchises within the case cited—that is, franchises that could not be exercised without first obtaining the consent of the municipalities within whose limits they were to be exercised. It thus appears that the present corporation is within the general scope of sections 1 and 4 of the act, and is not within the special exception of section 8; in other words, that it is a corporation required to make return to the State board. What that return is to set forth is declared by the act in unmistakable terms, “the gross receipts of its business in the State of New Jersey for the preceding year,” and then “an annual franchise tax of two per centum upon the annual gross receipts as aforesaid” is to be assessed upon the corporation in lieu of all other franchise taxes. There is here no suggestion that the tax is to be limited to such receipts as are derived from the exercise of municipal franchises.

The tax is affirmed, with costs.

Taxation on receipts of business of electric light company.—In the case of *Commonwealth v. Brush Elect. Light Co.*, 204 Pa. St. 249, 53 Atl. 1096, an electric light company was taxed upon its entire receipts, including those derived from selling electric power for manufacturing purposes and from sales of electric supplies. The court said: “By section 23 of the act of June 1, 1889 (P. L. 420), electric light companies are taxed eight mills upon the gross receipts from their business. The appellant, such a company, claims exemption from this tax upon certain items in its gross receipts, because they are not derived from electric lighting. They are for electric power furnished to individuals and corporations for manufacturing purposes, and for sales of electric supplies, such as lamps, drop lights, fans, etc. The contention of the appellant is that, as it is incorporated as an electric light company, only its gross receipts from electric lighting are taxable. But such are not the words of the statute. They are clear and unambiguous, as they must be, if the commonwealth is entitled to the taxation imposed. *Boyd v. Hood*, 57 Pa. 98. The tax is not to be paid upon the gross receipts from electric lighting, but upon the

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gross receipts from the business of the company. For the purpose of enlarging and swelling the volume of its business, it furnishes not only electric light, but electric power to manufacturers, and sells electric supplies. Having so extended its business beyond the mere furnishing of light by electricity, the company has largely increased its revenues, and it would be a strained construction of the words of the statute if the gross receipts from its business should be interpreted as meaning only its gross receipts from electric lighting, simply because it is called an electric light company. It is taxed on what it does. The statute imposes the tax not upon a portion of its receipts,—those derived from a particular commodity it supplies to the public,—but upon all of its receipts from its general business conducted under its franchises. Having, under what it regards as its franchises, not questioned by the commonwealth, enlarged its business by extending the same beyond the mere furnishing of light, and having realized largely increased revenue from so doing, its plea for abatement of the tax claimed by the State is ungracious, and cannot avail it in the face of the statute declaring what it shall pay."

PART V.

INJURIES TO PERSONS AND PROPERTY BY DEFECTIVE WIRES, POLES AND OTHER APPLIANCES IN STREETS, HIGHWAYS, AND PUBLIC PLACES.

(407)



WIRES IN STREETS.

POSTAL TELEGRAPH CABLE CO. V. JONES.

Alabama; Supreme Court.

1. INJURY CAUSED BY FALLEN WIRE WHICH FRIGHTENED PLAINTIFF'S TEAM.—
The plaintiff's team came in contact with a wire of the defendant, which had fallen from a defective cross-arm of the pole from which it was suspended, and from the shock the team became unmanageable and the plaintiff was thrown from his wagon and injured. The complaint alleged that the defendant negligently allowed its wire to remain a short distance above the road, so as to permit of contact with the plaintiff's team. It was held sufficient.
2. EVIDENCE AS TO NEGLIGENCE IN PERMITTING DETACHED WIRES.—Evidence as to rottenness of cross-arm, from which wire was suspended, and also as to the wires being down for a period of two days, held sufficient to infer negligence.
3. INSTRUCTIONS.—Instructions as to liability of defendant considered.

Appeal by defendant from judgment for plaintiff. Decided April 9, 1902; reported 133 Ala. 217, 32 So. 500.

This was an action brought by the appellee, C. A. Jones, against the Postal Telegraph Cable Company, to recover damages for personal injuries received by him while traveling along a public highway, by the side of which the defendant had its wires strung. The complaint, as amended, contained but one count. In this count the plaintiff alleged that on November 5, 1898, the defendant owned and operated a line of telegraph wire which was attached to poles along or near the public highway in Jefferson county; that said line of telegraph wire was heavily charged with electricity, "and it became and was the duty of defendant to use due care to have and keep said wire high up from the said road, yet, notwithstanding said duty, defendant negligently caused or allowed said wire to be or remain on or such a short distance above said public highway that the public traveling said highway were liable to be injured thereby." It was then averred that on the day above named the plaintiff was traveling along said highway in a wagon to which a team was attached, and that said team came in contact with the said wire, and, as a proximate consequence thereof, the team became unmanageable, plaintiff was thrown from the wagon, and came in contact with the wire, charged with electricity, and sustained the damages complained of. The plaintiff claimed \$500 as damages. To this complaint the defendant demurred upon the following grounds: (1) It

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fails to aver any duty that the defendant owed to the plaintiff in the matter of the manner of maintaining its wires. (2) That the complaint fails to show that the defendant did not discharge its duty to the plaintiff. (3) The complaint fails to show with reasonable certainty in what the alleged negligence of the defendant consisted. (4) It fails to aver what, if any, negligence on the part of the defendant contributed proximately to plaintiff's alleged injuries. This demurrer was overruled. Thereupon the plaintiff filed the pleas of the general issue and the following special pleas: "(4) For further answer to the complaint, the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, neither the defendant, nor the employees of defendant whose duty it was to see that its wires at the point named in the complaint were properly attached to the poles, knew that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles. (5) For answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, neither the defendant, nor the employees of the defendant, whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles. (6) For further plea in this behalf the defendant says and avers that plaintiff ought not to have and recover of this defendant any sum, because it says and avers that the plaintiff contributed to his own injury, in this, that, knowing the wire referred to in the complaint was alongside of the alleged road, he, without due care, drove, or allowed to be driven, the alleged team against said wire, thereby contributing to his alleged injuries. (7) For further answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, that the defendant exercised reasonable care to prevent its said wires from becoming detached from its said poles, and that neither the defendant, nor the employees of the defendant whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles." To pleas 4 and 5 the plaintiff demurred upon the following grounds: (1) Said pleas do not interpose any defense which could not be set up under the plea of the general issue, and the facts averred in said pleas can be given in evidence under the general issue. (2) Said pleas fail to negative the negligence of the defendant in allowing the wire to be along or near the public road. The demurrer to each of these pleas was sustained. The judgment entry recites that there was a motion made to strike

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the seventh plea from the file. The grounds of this motion are not shown. Said motion, however, was overruled.

On the trial of the cause upon issue joined upon the remaining pleas, it was shown that on the night of November 5, 1898, the plaintiff, in company with two other men, was riding along a public road in Jefferson county, in a wagon drawn by a horse and a mule; that when they were about 13 miles from the city of Birmingham the team came in contact with a wire which was swinging about two feet from the ground, in the middle of said road; that this wire was charged with electricity, and the shock therefrom caused the team to rear and charge; that the wagon was broken, the occupants thereof thrown out, and the plaintiff fell on the wire, and the body of the wagon fell upon him; that this wire was owned, operated, and maintained by the defendant. The evidence for the plaintiff tended to show that on the day before, while plaintiff and his companions were going along the same road in the direction of Birmingham, the defendant's wire at the point on the road where the injury occurred had dropped from the cross-arm of the post from which it was suspended, and was propped out of the road with a forked stick; that the cross-arm by which the said wire was suspended from the post was rotten and broken. The evidence for the plaintiff further tended to show that the plaintiff's injuries were permanent in their character, and that the plaintiff had suffered a great deal, and was rendered less able to work. During the examination of one Lawler, who was with the plaintiff at the time of the accident, he was asked the following question: "Have you, or not, heard Jones, the plaintiff, give expressions of pain or suffering since that night?" To this question the defendant objected. The court overruled the objection, and the defendant duly excepted. The defendant, as a witness in his own behalf, testified in detail to the injuries sustained by him, and further testified that he did not have a doctor to attend him. The evidence for the defendant tended to show that the line along which the wire was running was maintained in good condition, and was of such material as was in use in well-regulated telegraph lines; that said line had been inspected by a competent lineman on October 14, 1898, just a short time before the accident; and that it was then found to be in good condition. One of the witnesses for the defendant, and who testified that he was the wire chief of the defendant, whose place of business was in Birmingham, further testified that by a system used by the defendant the wire chief could tell as soon as a wire was obstructed, and was enabled, by the use of an instrument called a "galvanometer," to approximate the distance from the office in Birmingham to the place of obstruction; that up to the time this witness went off duty at 4 o'clock, November 5, 1898, nothing had interrupted the wire along the line where the accident occurred. Another witness, who testified that he was the night wire chief, testified that about 9 o'clock on the night of November 5, 1898, the instrument referred to indicated that there was an obstruction along the road on which the plaintiff was injured, about 13 miles from Birmingham. The evidence for the defendant further tended to show that the next morning a lineman was sent to the place in question, and found that the wire had dropped from the post, but was propped up from the road by a forked stick. Two of the witnesses introduced for the defendant testified that the cross-arm

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on which the wire was suspended from the post was not rotten or broken. The evidence for the defendant further tended to show that the current of electricity along the wire which was alleged to have caused the injury complained of was not of sufficient force to be dangerous.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that, if the jury believes the evidence introduced in behalf of the defendant, they must find for the Postal Telegraph Cable Company. (2) The court charges the jury that, if they believe the evidence, they must find a verdict in favor of the defendant, the Postal Telegraph Cable Company. (3) The court charges the jury that although the jury may find from the evidence that the cross-arm which, it appears from the evidence, was detached from the pole at the point of defendant's line where the alleged injury occurred was rotten, or partially rotten, yet in this case no recovery can be had because of such alleged rotten or partially rotten cross-arm. (4) The court charges the jury that, if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence." The court at the request of the defendant gave to the jury, among others, the following written charges: (10) The court charges the jury that if they believe from the evidence that it is the custom of well-regulated telegraph companies to inspect the lines of such companies once a month; and if the jury further find from the evidence that the line which included the point where the alleged injury occurred had been inspected by a competent man on the 13th of October, 1898; and if the jury further find from the evidence that at the time of said inspection, provided they find there was such inspection by such man, the wires, poles, and cross-arms were in good and safe condition, and such as were and are used by well-regulated telegraph companies; and if the jury further find that the defendant, the telegraph company, did not know the line was down until or after the alleged injury to plaintiff, and that it was repaired the next morning; and if the jury further find from the evidence that the defendant used the ordinary and usual reasonable care of well-regulated telegraph companies in ascertaining whether the line in question was down,—then the verdict should be for the defendant, the Postal Telegraph Cable Company." There was verdict and judgment in favor of the plaintiff, assessing his damages at \$250. After the rendition of this judgment the defendant moved the court to set aside the verdict and judgment and grant a new trial upon the ground that the court erred in refusing to give the several charges requested by the defendant, because the verdict was contrary to the law and the evidence, because the court erred in its ruling upon the pleadings, and upon the following ground: "(8) The court, by giving to the jury charge No. 10 at the request of defendant, held on the evidence that the plaintiff was not entitled to recover, yet refused to give charge No. 2, which respective actions of the court operated to the injury of the defendant on the trial, and will operate to the injury of defendant on appeal." This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

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J. J. Altman, for appellant.

Bowman & Harsh, for appellee.

Opinion by McCLELLAN, C. J.:

There is no merit in the contention for appellant that the complaint did not aver the negligence counted on with sufficient particularity. The rule is that, the duty to exercise care being shown, the failure to perform that duty—the negligence causing the injuries complained of—may be well averred in the most general terms, little if at all short of the mere conclusions of the pleader; and this upon the entirely sufficient consideration, among others, that, if the defendant has been guilty of negligence, he knows as well as or better than the plaintiff can in what that negligence consisted. *Railroad Co. v. Jones*, 83 Ala. 376, 3 South. 902; *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Railroad Co. v. George*, 94 Ala. 214, 10 South. 145; *Improvement Co. v. Campbell*, 121 Ala. 50, 25 South. 793, 77 Am. St. Rep. 17; *Armstrong v. Railroad Co.*, 123 Ala. 233, 26 South. 349; *Railway Co. v. Davis*, 92 Ala. 307, 9 South. 252, 25 Am. St. Rep. 47; *Stanton v. Railroad Co.*, 91 Ala. 384, 8 South. 798; *Railway Co. v. Chewning*, 93 Ala. 26, 9 South. 458; *Laughran v. Brewer*, 113 Ala. 509, 21 South. 415; *Railroad Co. v. Orr*, 121 Ala. 489, 26 South. 35; *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231; and many other cases.

The objection, taken by demurrer, that the complaint does not sufficiently show a duty on the part of the defendant to keep its wires out of the way of travelers along public roads, is too palpably unfounded to require discussion. The complaint does aver such duty, and the courts take cognizance of it even without averment. In this respect the case is analogous to that of *Louisville & N. R. Co. v. Marbury Lumber Co.*, *supra*, in which the complaint averred that the defendant negligently set fire to and burned plaintiff's cotton. We know in this case that it was defendant's duty to exercise care to avoid obstructing public roads, as we know in

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that it was defendant's duty to exercise care to avoid burning plaintiff's cotton.

All the facts averred in pleas 4, 5 and 7 were provable under the general issue. The averments of these pleas were mere denials of negligence, and on this ground the appellant can take nothing by reason of the court having sustained the demurrer to those numbered 4 and 5. Both those and plea 7 might well have been stricken on the ground referred to.

Plea 7 was allowed to remain in the case, however, and appellant's counsel insist that it was proved on the trial. We do not find that it was proved. The plea alleges that the defendant used due care to prevent its wires from becoming detached from its poles. The evidence for plaintiff was that the wires at the point they fell and obstructed the highway had been attached to the pole from which they became disengaged, by means of a rotten cross-bar, etc. On this evidence it was clearly a question for the jury whether the due care alleged had been proved. The plea also alleges that the defendant did not know, and by the exercise of reasonable care could not have known, that the wires had become detached from the pole until after the injury to plaintiff; but the evidence for the plaintiff showed that the wires had been detached for more than two days before the injury was inflicted, and it was open to the jury to say upon this evidence that due care had not been exercised to discover and remedy the defective condition of the wires. Something is said in the case about an instrument in use in defendant's offices, by the use of which trouble with the wires may be detected and located. We do not understand that this instrument will indicate the detachment of a wire from a pole, and its consequent suspension in the way of travelers across a public road, or will indicate anything at all so long as the current of electricity carried by the wire is not obstructed. It indicated nothing in this case until the current was diverted from the wire in consequence of plaintiff's wagon and team and person coming in contact with it. The evidence about this instrument cuts no figure in respect of the inquiry whether defendant was negligent in allowing

the wires to become detached from the pole and sag into the highway for two or three days.

What we have said in respect of the complaint applies to the third charge requested by defendant. On the evidence the jury were fully warranted in finding that the cross-arm was rotten; that it was so rotten, or, being rotten, was used by defendant, in consequence of its (defendant's) negligence; and that such negligence in respect of the cross-arm was the efficient cause of plaintiff's injury, entitling him to a verdict. There being not only the evidence as to the rottenness of the cross-arm, from which damning negligence was inferable by the jury, but also evidence that the wires had been down two or more days before the injury, from which it was open to the jury to infer such negligence, and there being also evidence of the alleged injury, it requires no argument to demonstrate that the affirmative charge requested by defendant was properly refused.

It becomes necessary to remark, only because the contrary is insisted upon, that a charge to the jury "that, if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that the plaintiff was not seriously hurt," is such a singling out and giving undue prominence to a part of the evidence as is unwarranted, and as has been over and over again condemned by this court.

The evidence tended to show that the plaintiff had continued to suffer more or less from the injury ever since it was received. The question to the witness Lawler, "Have you not heard the plaintiff give expressions of pain or suffering since that night?" covered the time under inquiry, and was not objectionable.

There was no inconsistency on the part of the Circuit Court in giving charge 10 for defendant, and refusing the general charge asked by defendant. The jury were left free by this tenth charge to find that the wires, poles, and cross-arms of defendant's line were not in good and safe condition when Worthy last inspected the line, and upon that to return a verdict for the plaintiff, while all this would have been denied them by the affirmative charge. This

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matter is made a ground of the motion for a new trial, and is the only ground of that motion specially insisted upon by counsel. The contention in this connection is not that the court should have granted a new trial for having erroneously refused to give the general charge for defendant,—that is another ground of the motion,—but that a new trial should be granted to defendant because the court gave charge 10 at its request. We confess we do not see how the defendant can ask a new trial on the ground that the court in a specified instance ruled at his request in his favor.

We do not understand that any of the other grounds of the motion for a new trial, except such as we have above considered apart from that motion, are insisted on. Whether so or not, they are without merit.

Affirmed.

EMPORIA, CITY OF, v. BURNS.

Kansas; Supreme Court.

1. NOTICE TO MUNICIPAL OFFICERS AS TO DANGEROUS CONDITION OF ELECTRIC WIRES.—If the disturbed condition of a city telephone and fire alarm system indicates to the city officials that the fire alarm wire may be broken and down in the street, it is their duty to investigate the cause of the disturbance to ascertain if the wire constitutes a dangerous obstruction to the use of the street; a notice of a disturbance of the system, caused by the fire alarm wire being broken and down, will be notice of the obstruction of the street.

(Syllabus by the court.)

Error by defendant from judgment for plaintiff. Decided April 10, 1903; reported 73 Pac. 95.

J. Harvey Frith and *Buck & Spencer*, for plaintiff in error.

Opinion by BURCH, J.:

This controversy was before the court for consideration in *Burns v. Emporia*, 63 Kan. 285, 65 Pac. 260, where the substan-

tial facts are stated. The case was then remanded for a new trial, because the District Court had undertaken to determine as matters of law certain questions which should have been submitted to the jury as matters of fact. Those questions related to the subject of notice to the city, actual and constructive, of the dangerous condition of its street. The same subject is again the apple of discord. Upon the second trial the evidence relating to notice was submitted to the jury, who found the facts against the city, and a careful analysis of the testimony shows it to be sufficient to sustain the verdict. The source of notice to the city of the fact the wire was down in the street was a disturbed condition of the telephone and fire alarm wires connecting the city fire station with the waterworks some two miles distant. It is argued the wire which caused the injury was used for the sole purpose of communicating alarms of fire; that the city might allow the wire to become so far out of repair as to be utterly worthless for the single purpose for which it was maintained without violating any duty to the plaintiff or to other residents of the city; and that notice of defective fire alarm service was not notice of an obstructed street. The evidence quite effectively disposes of this argument. Frank Newell, who was in charge of the city's fire extinguishing apparatus on the day of the accident, testified that after a fire on the afternoon of that day he undertook to communicate with the engineer at the waterworks. His examination then proceeds: "Q. And at the time you rang him up, you and he ascertained the fact that the wire was down? A. Yes, we knew there was something wrong with it. We didn't know the wire was broken in two; only we knew there was a circuit on the fire alarm wire and the telephone wire. Q. That would indicate that it was down? A. Yes, that would indicate that it was down or crossed some place." On cross-examination he further testified: "Q. When did you have any occasion, after getting through with the fire and getting back, to use that particular wire? A. When we got back from the fire, and I put up the team and got things straightened up in the house so

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that I could leave them. I went upstairs to ring Bacon up, and I found when we rang the drop at the waterworks dropped. Q. Then what did you learn? A. We then found out that the wire was either down or crossed some place. Q. It didn't work? A. No, it didn't work, nor wouldn't work. Q. You were not suspicious that the wire was broken? A. We didn't know; only we knew there was trouble with the fire alarm wire, and it didn't work. Q. You knew it had occurred before? A. Yes." Frank Bacon, the waterworks engineer, testified on cross-examination as follows: "Q. How far apart on the poles were those wires; that is, how much higher was the alarm wire than the telephone wire? A. I couldn't say. Probably from 18 to 24 inches. Q. . . . If in either ringing or calling your attention over the telephone wire, it would in fact set off your fire alarm over at your end of the line, that would indicate to your mind that the alarm wire had broken and dropped down onto the telephone wire? A. It would not necessarily be broken; it might have been crossed without being broken. Q. Could it ever well be crossed without being broken, if the distance was as far apart as you say—18 to 20 inches? A. No, sir. Q. In order to drop down onto the telephone wire it would have to be broken? A. No, sir. Sometimes the wires will come loose from the post." It is true that Bacon's subsequent testimony is much opposed to that just quoted. But the jury heard the first answers as well as the later ones. From this evidence it is apparent the city employee knew there was a likelihood that the wire was broken, and down in the street. Such was one of a very limited number of inferences to be drawn from the physical facts with which they were dealing, and they did not know but that it was the true one. If such were the condition of the wire, it was certain to be dangerous to travel. It was the duty of the city, therefore, to investigate, and an investigation would have disclosed the fact that the wire was actually broken, down in the street, and a serious menace to the safety of persons walking and driving along such street. Under these circumstances the city must be held to have had all the information it should have acquired by the exercise of due diligence, and the defendant was

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not prejudiced by the findings of the jury as to the quantity of information possessed by the mayor of the city when the state of the alarm system was reported to him. A close examination of the record discloses that other special findings are not vulnerable to the attack made upon them.

The second instruction to the jury stated in order the facts of the accident, and it is challenged as assuming as an admitted fact that the fallen wire was the cause of the horse running away. The instruction, however, assumes nothing. It merely states undisputed facts, and leaves the jury to determine from all the evidence—which included the conduct of the horse at the time, cuts found on him afterwards, and the manner in which the buggy was involved in the wire—if the wire was the cause of the horse's fright, and therefore of the injury.

The claimed defects of other instructions are not of such vital importance as to require a new trial of the action, and the judgment of the District Court is affirmed. All the justices concurring.

LEE V. MARYLAND TELEPHONE & TELEGRAPH COMPANY.

Maryland; Court of Appeals.

1. INJURY TO PEDESTRIANS FALLING OVER CONCEALED WIRE.—It appeared that the plaintiff crossing a street caught her foot in a wire lying concealed in the grass, but attached at one end to a pole, and that she was thereby thrown to the ground and injured. In the absence of evidence as to who was the owner of the wire or responsible for it being in the place where the accident occurred, the plaintiff could not recover.

Appeal by plaintiff from judgment in favor of defendant. Decided July 2, 1903; reported 55 Atl. 680.

S. A. Williams and *Harry Carver*, for appellant.

W. W. Preston and *Thomas H. Robinson*, for appellees.

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Opinion by SCHMUCKER, J.:

The appellant sued the appellees in the Circuit Court for Harford county for damages for injuries sustained by her through falling over a loose wire lying on a public street in the town of Belair. At the conclusion of the plaintiff's evidence the court granted a prayer offered by the defendants taking the case from the jury for want of any evidence legally sufficient to establish the defendant's liability for the plaintiff's injury. The only issue presented by this appeal is that of the propriety of the court's action in granting the prayer.

There is evidence in the record tending to prove that the plaintiff in the latter part of April, 1902, when starting to cross Broadway in Belair with the use of due care, caught her foot in a wire lying concealed in the grass, but attached at one end to a pole, and that she was thereby thrown to the ground and injured. The question in the case is whether there is any evidence that would warrant a jury in finding that the defendant corporations or either of them, owned the wire or had such control over it at the time of the accident as to be responsible for negligence in the management or care of it. It is conceded that neither of the defendants owned the pole to which the wire was attached, or had any poles at or near the locality of the accident. The pole was in fact shown by the evidence to be one of a system of electric light poles in which the defendants had no interest. It was sought to hold them liable for negligence in permitting the wire to lie on the ground along the public road, upon the theory that they were the assignees or successors in title of the persons who originally strung the wire, for the purpose of a former telephone connection, on the electric light poles, with the consent of the owners of those poles. In the attempt to support that theory, the plaintiff introduced evidence tending to show that four persons, as copartners, started the telephone service in Belair in 1894; that in March, 1895, they admitted two or three other persons into the firm; and that in September the firm became incorporated under the name of the Harford County Telephone Company. It was also testified that it was understood between the parties to this incorporation that the

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company became the owner of the electrical equipment and wires which had been owned by the individuals who composed it, but there was no formal or written transfer of the property from the individuals to the company. There was also evidence tending to show that the lines of the Harford County Telephone Company were operated by the Maryland Telephone Company at the time of the accident. The plaintiff also offered evidence tending to prove that in 1894, while the telephone enterprise in Belair was still in the hands of its four originators, a pair of wires were strung by them out Broadway, passing by the place of the plaintiff's accident, on the electric light poles, in order to serve a telephone in Dr. Richardson's residence, and that those wires remained on the light poles after the telephone had been removed. She further offered evidence tending to prove that in February, 1902, several months prior to the accident, a naked wire, such as is used for telephone service, fell down off the light poles on to the ground on Broadway at or near the place of the accident, and that several persons had shortly prior to the accident encountered a loose wire of that kind lying there by the roadside. John H. Reckford, who was interested in the firm owning the light poles on Broadway, and had been one of the promoters of, and for five years a director in, the Harford County Telephone Company, testified for the plaintiff that he knew from correspondence and conversations with Mr. Brown, who was an officer of both of the defendant corporations, that the telephone wires in question belonged to the Harford County Telephone Company, but he did not state what the correspondence and conversation were by which he arrived at that conclusion. He also testified that he had called the attention of the managers of the telephone company to the presence of the loose wires on Broadway, and that the latter promised to remove them, but did not do so. This witness admitted on cross-examination that he did not know of his own knowledge who had put these wires on the light poles, or whether Dr. Richardson ever had a telephone in his house, or that the telephone company had, while he was one of its directors, ever put any telephones on Broadway. So it is apparent that his belief as to the ownership of

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the wire in question rested upon hearsay. Walter Finney, who was also one of the promoters of the Harford County Telephone Company, and its first manager, and was connected with it for some time, testified for the plaintiff that he never heard of the telephone wires on Broadway until some time after the company had taken hold of the telephone enterprise, and further testified that the company had never exercised any acts of ownership over those wires or had anything to do with them. The plaintiff's evidence, of which we have stated the material portions, is, in our judgment, not legally sufficient to affect the defendants, or either of them, with liability for the accident, because it does not tend to prove that they owned or were in control of the wire which caused it at the time of its occurrence. The witness Reckford did state that, from the correspondence and conversations with their officers, he was satisfied that the appellee owned the wire; but this was merely an expression of his own opinion, as he did not say what statements those officers made in their correspondence and conversations, so that the jury could determine whether they amounted to admissions of ownership of the wire. The legal incompetency of such evidence as that to prove its ownership is apparent. There is evidence in the record tending to prove that a wire similar to the one which caused the accident had been strung along Broadway on the electric light poles some years ago by the individuals who originated the telephone enterprise in Belair, and used for a brief period to serve a telephone, and that it had been permitted to hang on the poles after it was no longer in use, but this evidence does not tend to prove its ownership by either of the appellees. Any presumption of ownership that might arise from the testimony that it was the understanding and purpose of the incorporators of the Harford County Telephone Company that the company, when formed, was to have the plant and wires theretofore owned by them, is negatived by the latter part of the same testimony, which shows that this wire, at least, never was actually transferred to the company, or taken into its possession, or used by it. If it was the intention of the incorporators to transfer their wires and plant to the company in payment for its capital stock,

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there is a total absence of evidence of a compliance by them with the method of procedure which the law declares to be essential to the effectual accomplishment of that purpose.

We think the learned judge below properly refused to send the case to the jury, and we will affirm his action in so doing. Judgment affirmed, with costs.

ELA V. POSTAL TELEGRAPH CABLE CO.

New Hampshire; Supreme Court.

1. INJURY FROM WIRE IN HIGHWAY DISLODGED BY FALLING TREE.—The evidence tended to show that the defendant was negligent in stringing wires on the inside of poles placed on the outside of the curve in a highway at the place of the accident, and in using improper brackets to support the wires, and not providing guards to catch them if detached. It was shown that the wire causing the accident might have been dislodged by a tree felled against it by the owner of abutting land. It was held that the defendant was liable, although the wire was so dislodged, since from the evidence it was properly inferable that the defect in the hanging of the wire was the proximate cause of its falling.

Exceptions by plaintiff to verdict for defendant. Decided May 28, 1901; reported 71 N. H. 1, 51 Atl. 281.

The defendants maintained a line of telegraph poles, carrying four wires, along a highway in Hooksett, running through a large tract of woodland. The growth on each side extended to the wrought portion of the highway, and was of sufficient size to be cut into logs and cord wood. At the place where the plaintiff was injured there was a curve in the highway, and the poles were set on the easterly side of the highway, along the outside of the curve. Two of the wires were strung on the inside of the poles, and so were likely to fall into the highway if detached. There was evidence tending to prove that the defendants were negligent in constructing the line in this way; that the poles should have been set on the opposite side of the highway, being the inside of the curve, or the wires should have been strung on the outside of the poles. There was also evidence of negligence in not using the most approved brackets to support the wires, and in not providing guards to catch the wires if detached. On the day of the accident, and for several weeks before, one Lynch, a person acting independently of the defendants, was engaged in clearing the wood lot. A tree

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cut by him on the westerly side of the highway fell across it, and soon afterward the defendants' wires were found to be detached from the poles and in the highway. Lynch testified that he put a brace against the easterly side of the tree to prevent it from falling into the highway; that the wind blew from the west, and pressed the tree against the brace so as to break it and cause the tree to fall in that direction; that the brace was a suitable one; and that no other tree fell into the highway. The plaintiff, while driving along the highway, came in contact with the wires and was injured. The jury were instructed, subject to the defendants' exceptions, as follows: "In the first instance, you will determine what was the cause of the wires being in the highway. Were they there because of the fault of the defendants in the construction of the line, or was their presence caused by the act of Lynch in felling the tree? If the act of Lynch was the cause you will have no occasion to consider any other question, and your verdict will be for the defendants. You will be asked for a special finding upon this question: Were the acts of Lynch the cause of the presence of the wires in the road? If the acts of Lynch caused the tree to fall into and across the road, so that the branches struck the suspended wires and detached them, and for that reason they fell across the highway, you will answer the question, 'Yes.' If but for the felling of the tree in this manner the wires would have remained in position, the law regards the acts of Lynch as the cause of the trouble. If you answer this question in the affirmative, you will also return a general verdict for the defendants. But if you answer it in the negative, you will come to the other questions,—those of the care of the two parties." The plaintiff requested the following additional instruction: "If you find the wires brushed or hit by the falling tree would not have been knocked off if they had been secured with reasonable care, the plaintiff may recover." It was given, with the following limitation, which was added subject to the plaintiff's exception: "But due care did not require that the defendants should anticipate and provide against the cutting and felling of trees by Lynch." The jury answered "Yes" to the special question, and returned a general verdict for the defendants.

Burnham, Brown & Warren and Charles H. Burns, for plaintiff.

Taggart & Bingham, for defendants.

Opinion by CHASE, J.:

The evidence tended to prove that the defendants were guilty of negligence in stringing wires on the inside of poles placed on the outside of the curve in the highway at the place of the accident, and in using improper brackets to support the wires, and not providing guards to catch them if detached. In consequence of this faulty construction, the wires, if for any cause detached, would naturally fall into the highway and endanger the safety of trav-

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elers therein. The negligence would not end with the construction of the line, but would continue so long as the wires were allowed to remain strung in that manner. It was liable to produce evil results at any moment. If the plaintiff's injury was due solely or proximately to such negligence, or if it was caused by such negligence combined with a wrongful act of Lynch, the defendants are liable.

As the case was presented to the jury, much stress was placed upon the act of Lynch in felling the trees. They were required to find specially whether this act was the cause of the presence of the wires in the highway, and were instructed that, if they found it was, their general verdict should be for the defendants. They were told that "if, but for the felling of the tree, the wires would have remained in position, the law regards the acts of Lynch as the cause of the trouble," and that "due care did not require that the defendants should anticipate and provide against the cutting and felling of trees by Lynch." It seems to have been taken for granted that the question of proximate cause is a question of law. This assumption was erroneous.

In this State it is well settled that the question of remote and proximate cause is a question of fact to be determined by the jury. *Gilman v. Noyes*, 57 N. H. 627; *Boothby v. Railway*, 66 N. H. 342, 84 Atl. 157; *Searle v. Parke*, 68 N. H. 311, 312, 34 Atl. 744; *Deschenes v. Railroad*, 69 N. H. 285, 289, 46 Atl. 467; *McGill v. Granite Co.*, 70 N. H. 125, 129, 46 Atl. 684. There was sufficient competent evidence bearing on the question to warrant its submission to the jury in this case. Besides the evidence of the faulty construction of the line of wires, and its natural tendency to cause injury to travelers upon the highway, it appeared that the poles and wires were located near trees of the woodland through which the highway passed, and that the trees were of suitable size to be manufactured into wood and lumber. The presence of such trees so near the wires evidently increased the chances of their dislodgment. The trees might be forced against the wires by winds or other natural causes, or, if cut, might fall against them. The defendants were chargeable with an apprehension of all contingencies

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in respect to a displacement of the wires which persons of average prudence would foresee under the circumstances. If they reasonably ought to have foreseen that the trees near the wires would probably be cut down, and, in being cut, might fall against and dislodge the wires, although felled with reasonable care, it was the defendant's duty to construct and maintain the line in a form that would avoid injury to travelers in case the wires were dislodged in that manner. So, in determining whether the presence of the wires in the highway was due to negligence on the part of the defendants, although Lynch's act was the immediate cause of their displacement, it is necessary to determine whether the defendants reasonably ought to have anticipated that an intervening act of that character might transpire. The latter question is involved in the question of negligence, and the whole is a question of fact to be determined by the jury. *Searle v. Parke*, 68 N. H. 311, 312, 34 Atl. 744. The fact that Lynch's act caused the wires to be in the highway falls far short of exonerating the defendants from liability, under the circumstances of the case. *Cowles v. Kidder*, 24 N. H. 364, 383, 57 Am. Dec. 287; *Hooksett v. Manufacturing Co.*, 44 N. H. 105. If he had felled the tree against the wires with the intention of forcing them into the highway, his act might be the proximate cause of the plaintiff's injury. The faulty construction of the line would facilitate the execution of his wrongful purpose, but it could not reasonably be said to be the cause of the wires being in the highway. The defendants would have no reason to expect such an act would be done, and consequently would owe no duty to a traveler in respect to it. But the evidence in this case, instead of showing an act of that character, tended to show that Lynch, while engaged in a lawful act, exercised due care to prevent the tree from falling against the wires. To exonerate the defendants from liability, in view of this evidence, it was necessary that the jury should find, in addition to the special finding, that the defendants reasonably ought not to have foreseen an act of this general character. This matter was not presented to the jury in connection with the special question submitted to them, and was expressly withdrawn from

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their consideration by the limitation that "due care did not require that the defendants should anticipate and provide against the cutting and felling of trees by Lynch."

Exceptions sustained. Verdict set aside. All concurred.

Wires in streets; obstructions; injuries to travelers.—An electrical company using streets and highways for its wires is bound to so maintain them as to avoid interference with the ordinary use of such streets and highways. The right of such a company to the use of such streets and highways is subject to the use of the traveling public. *Sheldon v. Western Un. Tel. Co.*, 2 Am. Electl. Cas. 299, 51 Hun, 591; *Starring v. Western Un. Tel. Co.*, 3 Am. Electl. Cas. 474, 11 N. Y. Supp. 817. In the latter case the plaintiff sued for damages caused by telegraph wires being removed from the defendants' poles in the highways in such a manner as to frighten his horses, and under the facts in the case the defendant was held guilty of negligence.

And acting under a franchise from a city, such a company owes the duty to the city and the public to maintain its wires in a safe condition. Such a franchise carries with it an implied obligation that its wires will not become nuisances, or endanger the safety of the traveling public. If the wires fall into the street so as to become an obstruction to public travel, it becomes the duty of the company to remove them. If it fails to do so after a reasonable notice and the lapse of sufficient time, it is negligence for which it will be held accountable for any injury occasioned thereby, without regard to the cause of their fall. *Nichols v. City of Minneapolis*, 1 Am. Electl. Cas. 762, 33 Minn. 430, 23 N. W. 868.

In the case of *Western Un. Teleg. Co. v. Eyser*, 91 U. S. 495, it appeared that the agents of the telegraph company were engaged in putting up a wire, and it was about two feet from the ground when the plaintiff's horse, upon which he was riding along the highway, became entangled in the wire, causing the injury complained of. The judgment for the plaintiff was reversed for error of the trial judge in charging the jury that they might allow exemplary damages. But the appellate court said: "The omission to station flag sentinels or to give some other proper warning, while the men were engaged in putting up the wire, was an act of negligence, entitling the plaintiff to compensatory damages."

Fall of wire by storm or other cause not within the control of the company will not subject it to liability for injuries thereby occasioned, if it be shown that the company was in the exercise of due care in providing for a suitable erection and maintenance of the wires, and did not negligently permit the wires to remain in a dangerous condition for an unreasonable length of time. *Mitchell v. Charleston Light & P. Co.*, 46 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *Ward v. Atl. & Pac. Teleg. Co.*, 1 Am. Electl. Cas. 259, 71 N. Y. 259, in which case the court (per Earl, J.) said: "The defendant (a telegraph company) is not absolutely bound to make its line safe to the public, to have its poles in the streets so strong and secure that they cannot be broken down by any storm. It does not insure the safety of travelers in the streets from injuries by its posts lawfully placed there. It is bound to use reasonable care in

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the construction and maintenance of its line so that no traveler shall be injured by it, and the amount of care must be proportioned to the amount of danger and the liability to accident. The poles must be strong enough to withstand such violent storms as may be reasonably expected, but they are not required to be so strong that no storm can break them, or to withstand such storms as reasonable foresight and prudence could not anticipate."

Prima facie proof of negligence.—In the case of *Arkansas Teleph. Co. v. Ratteree*, 57 Ark. 429, 21 S. W. 1059, suit was brought for damages for injuries caused by the servants of the telephone company letting a wire fall in a street, causing the plaintiff's horse to jump, throwing the plaintiff from the wagon. It was held that the facts were sufficient to prove prima facie negligence.

Low or sagging wires.—As has been said above, the right of an electric company to suspend its wires in streets and highways is subject to the duty to so erect and maintain them as not to impede public travel. As stated by Mr. Keasbey (*Keasbey on Electric Wires*, § 227): "The permission to set up telegraph and electric light wires is generally made expressly subject to the condition that they shall not interfere with the free use of the highway for public travel and transportation, and even without express words such a condition would, no doubt, be implied; and it is always understood that statutory powers of this kind are subject to the condition that they shall be exercised in a careful and proper manner." (Citing *Mercey Docks Trustees v. Gibbs*, L. R. 1 H. L. [Eng.] 93.)

It has therefore been customary for the courts to hold electric companies to strict accountability for injuries occasioned by wires negligently suspended in the streets at such a height as to incommode public travel. *Williams v. Louisiana Elect. L. & P. Co.*, 3 Am. Electl. Cas. 479, 43 La. Ann. 295, 8 So. 938; *Dickey v. Maine Teleg. Co.*, 46 Me. 483; *Thomas v. West. Un. Teleg. Co.*, 100 Mass. 156; *Nichols v. City of Minneapolis*, 1 Am. Electl. Cas. 762, 33 Minn. 430, 23 N. W. 868; *Pennsylvania Teleph. Co. v. Varnan*, 5 Lanc. Law Rev. (Pa.) 74 (affd. 5 Lanc. Law Rev. 401, 15 Atl. 624).

In the last case the trial court, in charging the jury, instructed them that it was the duty of a telegraph company to so erect and maintain its wires over and along highways as not to impede or obstruct ordinary travel thereon, or render it unsafe, and that if by neglect of the company in this respect injury is sustained by a person passing over the highway without fault on his part, the company will be liable, and that it is not necessary in order to show negligence in allowing a wire to hang too low, to prove that the company has been notified that the wire is obstructing the streets and has failed to remove it. The Supreme Court expressly sustained this charge. See, also, *Western Un. Teleg. Co. v. Engler*, 75 Fed. 102, 21 C. C. A. 246, holding that where a telegraph wire is allowed to remain suspended in the highway at a height of not more than three feet from the ground for a period of more than two months, a traveler injured thereby was not precluded from recovery because no notice had been given the company of the dangerous condition of the wire.

Guy wires in streets and highways.—The rules applicable to the stringing of electric wires in streets and highways necessarily apply to guy wires

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used to support the poles to which such electric wires are attached. Such guy wires must be so placed as not to impede or endanger the public in its use of the streets and highways. So, where a telegraph pole was sustained by a guy wire leading from it to a large stone sank in the ground, near to the traveled part of the highway, and in attempting to turn out to permit the passage of a team the plaintiff's carriage was caught by the wire and overturned, the telegraph company was held liable for the injuries sustained. *Skelton v. Western Un. Teleg. Co.*, 2 Am. Electl. Cas. 299, 51 Hun (N. Y.), 591, affd. 121 N. Y. 697. In the case of *Wilson v. Great So. Teleph. & Teleg. Co.*, 3 Am. Electl. Cas. 466, 41 La. Ann. 1041, 6 So. 781, a guy wire was erected in an unused portion of a city street at a height not sufficient to permit of the passage of vehicles; a fire plug was inside the pavement near the place where the wire was strung; a driver of a fire engine in attempting to drive his engine so as to connect with such fire was caught by such guy wire and severely injured; it was held that the company was negligent in so placing its wires as to impede the plaintiff in the performance of his lawful duties, and was therefore liable. And in *Lundeen v. Livingston Elect. L. Co.*, 6 Am. Electl. Cas. 322, 17 Mont. 32, 41 Pac. 995, it was held that a post from four to six feet in height, placed in the carriageway of a city street, and a guy wire attached to it four or five feet from the ground, for the purpose of supporting a pole for electric wires, are dangerous obstructions, the dangers of which should have been foreseen by the company creating it; whether placing the post and guy wire in the street by the defendant constituted an obstruction to the free and ordinary use thereof was a question of fact to be determined by the jury (citing *Hayes v. Railroad Company*, 111 U. S. 228; *Railway Co. v. Prescott*, 8 C. C. A. 109; *Sweeney v. City of Butte*, 15 Mont. 27, 39 Pac. 286).

Suddenly raising wire without notice.—The employees of an electric street railway, while engaged in stringing feed wires, allowed a wire to lie in the bed of a gutter on a public street for a distance of thirty feet or more, and then raised it suddenly to a height of about twenty feet, without giving notice of such intended action to passersby. As a result a boy was caught by the wire, thrown into the air and killed by the fall. It was held that the plaintiff was improperly non-suited. *Devine v. Brooklyn Heights R. Co.*, 6 Am. Electl. Cas. 318, 1 App. Div. 237, 37 N. Y. Supp. 170.

Duty of telephone company where wire is detached by falling tree.—In the case of *Fitch v. Central N. Y. Teleph. & Teleg. Co.*, 42 App. Div. 321, 59 N. Y. Supp. 140, it appeared that a falling tree, uprooted during a severe wind storm, dragged one of the defendant's wires, which extended across a public highway, from the pole to which it was fastened, and held it at such a height above the highway that it was not dangerous to a passerby; that on the next morning an employee of the overseer of highways attached the wire to another tree, leaving it suspended about ten feet above the highway; that on the morning of the third day thereafter there was considerable wind, and the wire, having from some unexplained cause become dislodged from the tree to which it was attached, came in contact with the top of a carriage in which the plaintiff was riding, resulting in the carriage being overturned and the plaintiff being injured. The wire in question at no time touched the ground so as to

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break the circuit and apprise the defendant of its condition, and the defendant was not aware of such condition until at or about the time of the accident. It was held that, as the defendant could not reasonably have anticipated the happening of the accident, it was under no obligation to adopt a system of supervision to guard against it; that under the circumstances the defendant was not chargeable with negligence.

MEMPHIS STREET RAILWAY CO. V. KARTRIGHT.

Tennessee; Supreme Court.

1. INJURY BY FALLING TROLLEY WIRE.—The plaintiff, while standing in the street, was injured by the fall of a trolley wire. It was not definitely shown what caused the breakage, but the plaintiff testified that the trolley pole of one of the defendant's cars knocked the wire down. The defendant's witnesses testified as to the quality of the wire, its condition, and its frequent inspection. It was held that the testimony was sufficient to justify the jury in inferring that there was negligence upon the part of the defendant.
2. DUTY AS TO CONSTRUCTION OF WIRES.—In view of the danger attendant upon the breaking and falling of overhead electric wires in the streets, and the results to be apprehended to persons in the streets, an electric railway company should be held to the highest or utmost degree of care in the construction, maintenance and operation of its lines.

Appeal by defendant railway company from judgment for plaintiff. Reported 1 St. Ry. 763, 75 S. W. 719; decided May 23, 1903.

Wright, Peters & Wright, for plaintiff in error.

Jerre Horne and M. C. Ketchum, for defendant in error.

Opinion by WILKES, J.:

This is an action for damages for personal injuries. It was tried in the court below by a jury, and there were a verdict and judgment for \$250, and the railway company has appealed and assigned errors.

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The facts, so far as necessary to be stated, are that plaintiff, a young man, about twenty years of age, was standing on the pavement at the corner of Rayburn and Vance streets, in the city of Memphis. A car of the defendant company was approaching on the street, when the trolley wire, forming part of its overhead construction, with an insulator upon its end, fell, and the insulator struck the plaintiff upon the head, inflicting a wound over his right eye, which left a permanent scar or blemish on his face. He was confined to his bed for several days, and was not able to work for some ten days, and incurred a medical bill of \$25. It is not definitely shown what caused the breakage and fall of the trolley wire, but the plaintiff states that the trolley pole knocked the wire down; that he saw it fly off and knock the wire down.

It is assigned as error that there is no evidence to sustain the verdict. This assignment is based upon the theory that there is no definite testimony as to why the wire broke, and no evidence of negligent construction, maintenance, and operation of the line, while there is testimony that the wire was in good condition, and had been inspected two days before; that at the time there was a break in the wire near the same place which was repaired, and the wire was then found to be in proper condition. The rule, as laid down in the case of *Chattanooga Ry. Co. v. Mingle*, 7 Am. Electl. Cas. 594, 103 Tenn. 667, is that "negligence on the part of the street car company in the selection, construction, or supervision of its guy wire is presumed, without further evidence, from the fact that such wire, dangerously charged with electricity, falls on or near a public street, even if its fall was caused by a stroke from the deranged trolley of a passing car." This presumption of negligence must be overcome by the car company. The evidence introduced by the company consisted of the testimony of Bowen, the lineman; Erickson, the foreman of the repair apparatus, called the "Trouble Wagon;" and a negro, Branch, a member of his crew. The testimony of these witnesses is quite contradictory, though they speak, in general terms, quite emphatically as to the quality of the wire, its condition, and frequent inspection. They are more or less interested, as employees whose duties were to make repairs and keep

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the line in order. On the other hand, the testimony of the plaintiff furnishes some evidence that the breakage was caused by the slipping of the trolley pole, which is not explained; and the jury, from his statement, might have legitimately inferred that there was negligence in the slipping of the pole, or a defect in the condition of the wire, and, under the rule, this is sufficient testimony, coupled with the presumption, arising out of the breakage, that there was negligence.

The other assignments of error may be treated together, and relate to the degree of care required to be exercised by electric street railways in the construction, maintenance, and operation of its superstructure.

The court charged the jury that the street car company was obligated to use the best material, most approved methods of construction, and the highest degree of care and skill in maintaining and keeping same in repair, considering the dangerous nature of the appliances, and the peril to life and limb embodied in their use. And it is insisted that this was requiring too great a degree of care, and the court was requested to charge that the company was only required to exercise a high degree of care in these respects, and not the highest degree of care. Counsel cites in support of his contention the language of this court in *Chattanooga St. Ry. Co. v. Mingle*, 7 Am. Electl. Cas. 594, 103 Tenn. 667; *Street Ry. Co. v. Nugent* (Md.), 38 Atl. 779; *Nellis on Street Surface Railroads*, 288. The trial judge, in portions of his charge, did state the rule to be a high degree of care, and defined the term, with accuracy, as requiring care commensurate with the perils to be apprehended, and such as would make the appliances safe in their use; but he also, in another part, charged that the highest degree was required. The charge is open to the objection that the rule is not stated in the same or equivalent terms in all portions of the charge, and was, to some extent confusing to the jury; but we must assume that the jury applied the strict rule of the highest degree of care, in order to constitute error, even upon defendant's contention. It is true in the case of *Chattanooga St. Ry. Co. v. Mingle*, 7 Am. Electl. Cas. 594, 103 Tenn. 670, this court said:

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"In view of the extreme peril consequent upon the displacement and fall of the wires, and in the operation of an electric railway system, it is essential that a high degree of care be exercised, not only in the construction, but in their continued maintenance in a good and safe condition."

Citing *Denver Cons. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371; *Giraud v. Electric Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120. The real point at issue in the *Mingle* case was whether the doctrine of *res ipsa loquitur* applies in case of breakage of the wires, so as to require the company to repel the presumption of negligence arising from the mere fact of breakage; but the court was not attempting to lay down with strict accuracy the full measure of care required of such companies in the construction, maintenance, and operation of their lines. So the question recurs, was it error to instruct the jury that the highest degree of care must be exercised? In the case of *Denver Cons. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, it was said by the trial judge:

"The defendant was not an insurer of the safety of the plaintiff, but, in constructing its line and in maintaining the same in repair, it was held to the highest degree of care and diligence, and in this respect was bound to the highest degree of care, skill and diligence in the construction and maintenance of its lines of wires and other appurtenances, and in carrying on its business so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such a degree of care, it was not liable. If it failed therein, it was liable for the injuries caused thereby."

On appeal this charge was affirmed, the Appellate Court saying:

"Where all minds concur, as they must in a case like the one we are considering, in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was, therefore, not prejudicial error for the court to tell the jury in that case what the law requires of the defendant, viz., the highest degree of care in conducting its business. The late case of *Block v. Milwaukee St. Ry. Co.*, 5 Am. Electl. Cas. 293, 89 Wis. 371, rightly interpreted, supports this doctrine; and the case of *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, expressly lays down the rule as observed by the trial court in the instructions given in this case."

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In *Giraud* case, *supra*, the court say :

"The public, aside from the consumers using the commodity, owe no duty to those introducing it. But on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public, which consists in considerable members. They must protect those having less than the ordinary knowledge of the character of the commodity."

In *Haynes v. Raleigh Gas Co.*, *supra*, the rule is stated thus :

"It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to use the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate with it. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden."

In *City Elec. Ry. Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381, the court uses this language :

"Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard. This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents, for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, have guarded against."

In the case of *Cook v. Wilmington City Elec. Co.*, 9 Houst. 306, the court say :

"The law requires that they (electric light companies) should use every way to protect and save the public from loss or injury. They must use every means, regardless of expense, to protect and make safe the public, or citizens passing over the streets of the city, who are not aware of danger. They must

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use due care and ordinary diligence in such case, with the legal meaning in law following and attached to such words as I have stated."

As to the meaning of these words, the court say:

"The words 'usual and ordinary care' mean, in such cases, nothing more or less than, if there be a great danger and hazard in the business, there should be a corresponding degree of skill and attention 'required by the law.'"

Mr. Keasbey, in his work on Electric Wires, says:

"The use of the electric current is authorized by law. It will do no harm if it is kept in its proper place, but it is very dangerous if it is allowed to escape. Those who use it are charged with a public duty to use the greatest care to keep it from doing harm, and, for failure to observe this care, they are responsible to persons using the public streets who may be injured without any fault of their own." Keasbey on Electric Wires, sec. 243.

And Mr. Joyce, in his work on Electricity, holds the same view:

"An electrical company is under the duty of so maintaining its wires as not to interfere with the free, unobstructed and safe use of the highway. Although it is not an absolute insurer of its wires, yet it is bound to use the utmost care in maintaining them." Joyce on Electricity, sec. 450; see, also, *McAdam v. Central R. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445.

We are of the opinion that in view of the danger attendant upon the breaking and falling of overhead electric wires in the streets, and the results to be apprehended to persons in the streets, the company should be held to the highest or utmost degree of care in the construction, maintenance, and operation of its lines; and the court was not in error in so charging. We are of opinion, also, that, taking the whole of his charge together, the jury must have understood the trial judge to lay down the rule of the highest degree of care; and there is, therefore, no reversible error in the record, and the judgment is affirmed, with costs.

Other Cases Relating to Injuries Caused by Suspended Wires.

1. Injury to railway employee by telephone wire suspended across railway track; evidence of ownership of line.—In the case of *American Telegraph & Telephone Co. v. Kersh*, 27 Tex. Civ. App. 127, 66 S. W. 74, the plaintiff, a railway employee, was injured by being dragged from the top of a car by a wire suspended over the line of the railway. It was alleged in the petition that the wire was a part of the line of the appellant, and was not sus-

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pended high enough above the railway track to permit cars to pass under it without injury to the employees of the railway company. The defense on the part of the telephone company was that the line, where it crossed the railway track, did not belong to it, and that it was not charged with the duty of keeping it in repair. It appeared that the wire was a part of a branch line constructed by the telephone company for the use of certain persons. The right of way for the branch line was furnished by a private individual, and the line was erected by the telephone company. It was agreed between them that the company should furnish the telephone, and that the rental should be divided between the company and such individual. The evidence showed that the company had repaired the line at various times, and that the wire had been down and had been put up again by a man in the employ of the company, and that after it had been put up it hung so low as to obstruct the passage of trains. Under such facts the jury was held justified in finding that the telephone company owned and controlled the branch line, and was, therefore, liable for negligence in failing to so suspend the wire across the railway tracks as to permit the passing of trains with safety to persons on the top of a car. In view of the evidence to the effect that the wire was repaired by one employed by a person authorized to employ him for that purpose, it was held proper to refuse an instruction making the company's liability depend upon whether or not the person making the repairs was directed by one authorized to act for the company.

2. Evidence as to condition of wire.—The case of *Hamum v. Hill*, 52 W. Va. 166, 43 S. E. 223, was an action for personal injuries received by reason of the negligence of a telephone company in permitting its wires to be stretched so low down over the highway as to be caught by a horse's feet in passing. It was held incompetent to prove the condition of the wire at that point six months subsequent to the injury complained of. The court said:

"The twelfth assignment is that the court erred in refusing to permit the defendants to prove by the witness W. C. Smith, and other witnesses, the facts and circumstances relating to the telephone line and the wires, and the impossibility of plaintiff's being injured thereby as claimed by him, as set out in bill of exceptions No. 8. Defendants offered to prove by said Smith and other witnesses that they had gone to the place in the road where the accident occurred in the month of June, 1900, about six months after the occurrence, and, upon examination, to show that the wire, in the condition as it was then, would not, when removed from pole No. 2, have come down in the middle of the road, so that the horse's feet would become entangled in it as stated by plaintiff, and that as fastened on pole No. 1, just above the large elm, and on No. 3, next to Petersburg, and not fastened on pole No. 2, between poles 1 and 3, the said wire, as then fastened on poles Nos. 1 and 3, would not come down in the road low enough at any place near the middle of the road to catch a horse's foot just above the hoof, so as to throw the horse down, and that said telephone wire would not lie on the ground near the middle of the road at the point where the plaintiff

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claimed his horse's foot was caught in the wire, but that said wire would lie in the ditch along the side of the road, owing to the location and situation of the road and of said poles and wire, and offered to prove by said witness that from the location of said wire, and the situation of the said poles, and the contour of the ground at and near the point where plaintiff claimed to have been injured, the plaintiff's horse's foot could not have caught in the wire as plaintiff claimed, as it was admitted that the wire was running along the road in the same direction the horse was going. Plaintiff objected to the introduction of such testimony, and the court refused to allow said witness to so testify unless and until it was first shown that said telephone line, poles, wires and insulators at said point were in the same condition when said examinations were made as they were when the alleged injury was done. Defendants then introduced Edward Lewis to testify that a short time after plaintiff claimed to have been injured, and before said examination was made by Smith and others, he had come over the line for the purpose of repairing it, and had stretched the wire and found the wire fastened to pole No. 1 by a loop of wire a foot to eighteen inches in length, and it would admit of the telephone wire being a foot to eighteen inches lower down from the top of the pole than it was when the witness Smith and others went and examined it. Lewis further testified that, when he went to repair the telephone line at that point, he unfastened the wire at pole No. 3, and stretched the wire as testified by him. The defendants then again offered to prove by Smith and other witnesses the facts as to the examination made by them in June, and the result of said examination, so as to establish the fact that said wire could not have been stretched across the road in the manner stated in plaintiff's declaration, so as to have caught the horse's foot as claimed in plaintiff's evidence. In January, when the injury occurred, the wire was loosed at three poles—Nos. 1, 2 and 3. In June the wire had been tightened by Lewis—as tight as he could make it with his hands—and fastened to the insulators on the said three poles, and Smith unfastened the wire from one pole; and it was proposed to prove by him the condition of the wire with its being unfastened from one pole only. The court did not err in refusing to allow the witness to testify as to the condition of the wire in June."

INJURIES CAUSED BY POLES IN STREETS.

RILEY V. NEW ENGLAND TELEGRAPH & TELEPHONE CO.

Massachusetts; Supreme Judicial Court.

1. **LIABILITY OF TELEGRAPH COMPANY FOR INJURIES CAUSED BY POLES IN HIGHWAY.**—A statute (Mass. Rev. Laws, ch. 122, sec. 15) providing that, "whenever injury shall be done to any person or to the buildings or other property of any person or corporation by the posts or other apparatus of any telegraph line, the company, or individual, being proprietor of the same, shall be held responsible in damages to the person or corporation so injured," indicates an intention on the part of the Legislature to permit telegraph poles in the streets and highways upon condition that those who use them to their own profit should make compensation for damages caused thereby, and the company erecting such poles is liable for damages to all persons injured in person or property thereby, whether the injury was caused by negligence or by pure accident. So where a person is injured by being thrown from a wagon colliding with a telegraph pole the telegraph company is liable for the damages caused by such injury, although the pole was erected and maintained by the company in accordance with a license granted by the proper municipal authority.
2. **CONTRIBUTORY NEGLIGENCE.**—The statute does not make the telegraph company an insurer against injuries to persons whose own fault is one of the causes of the injury. The language of the statute does not indicate that the absolute liability thereby imposed applies to persons who by their own conduct would be precluded from recovery against a defendant in an action for negligence.

Exceptions brought by plaintiff from a judgment in favor of defendant. Decided September 2, 1903; reported 68 N. E. 17.

C. E. Washburn and A. S. Hutchinson, for plaintiff.

Powers, Hall & Jones and F. A. Houston, for defendant.

Opinion by KNOWLTON, C. J.:

The plaintiff was driving along Bridge street in Cambridge upon a market wagon, the hubs of whose wheels projected six

inches beyond the rims and spokes. The body of the wagon had wings extending laterally as far as the hubs. A telegraph pole of the defendant was set close to the curbstone on the inside, and it leaned a little towards the center of the street. A standpipe used to fill watering carts stood beside the telegraph pole, and the dripping from it caused a sinking or depression in the cobblestone pavement, small in area, but two or three inches in depth near the curbstone and opposite the telegraph pole. As the right forward wheel of the plaintiff's wagon fell into this hollow, the body of the wagon lurched to the right towards the pole, so that the wing struck the pole, and the collision threw the plaintiff out and injured him. The pole was erected in accordance with a license granted by the board of aldermen, which required the defendant to maintain it as nearly perpendicular as practicable. There was a question whether its leaning was a departure from the requirements of the license.

The plaintiff asked the judge to instruct the jury as follows: "The defendant is liable to the plaintiff in this action if the latter, while traveling on the public highway and in the exercise of due care, was injured by reason of a telegraph pole belonging to the defendant, although said pole was erected and maintained by the defendant in accordance with the license granted by the board of aldermen of the city of Cambridge."

The judge refused to give the instruction requested, and gave the jury this instruction: "If you find that the pole was erected and maintained in accordance with the specifications of the municipal officers, and that there was no negligence on the part of the defendant in its construction or maintenance of the pole, then the plaintiff cannot recover, even if in the exercise of due care, in the absence of any direction by the municipal officers to alter the location or construction of said pole."

The exceptions to the refusal and to the instruction bring us to the consideration of the statute under which the pole was erected. St. 1851, p. 739, ch. 247, sec. 2, is as follows: "Whenever injury shall be done to any person, or to the buildings or other property of any person or corporation, by the posts, wires, or other

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apparatus of any telegraph line, the company or individual being proprietor of the same shall be held responsible in damages to the person or corporation so injured."

St. 1859, p. 417, ch. 260, sec. 1, which was doubtless enacted to change the law stated in *Young v. Yarmouth*, 9 Gray, 386, provides that "towns which may be otherwise liable in damages to any person for injury to his person or property, occasioned by telegraphic posts or other fixtures erected on highways or town ways, shall not be discharged from such liability" by reason of anything contained in the act authorizing the erection of such posts, and makes the companies erecting the posts or fixtures liable to reimburse and repay to towns the full amount of damages and costs recovered by any party injured. These two statutes were combined in Gen. St. 1860, ch. 64, sec. 11, with a slight change, and re-enacted in Pub. St. 1882, ch. 109, sec. 12, and again re-enacted with only verbal changes in Rev. Laws, ch. 122, sec. 15. The first of these two statutes creates a liability without any reference to negligence. The Legislature seems to have recognized that the erection of the poles and fixtures in public ways would create obstructions which might interfere to some extent with the use of the public streets, and increase the liability of travelers to accidents. Such obstructions, whether placed in a sidewalk or in a part of street designed for use by vehicles, being there when the streets are lighted and when they are in darkness, and in every variety of possible conditions, subject persons in the exercise of due care to risks which otherwise would not exist. While the Legislature saw fit to authorize the use of the streets for telegraph lines, it provided at the same time that the telegraph company should be liable for damages to all persons injured in person or property by these erections. Doubtless the fact that electricity is a subtle and dangerous agency, which was less understood in 1851, when this statute was enacted, than it is now, was an added reason for creating this legal liability without regard to negligence. Wires and other apparatus, as possible causes of injury, are treated by the statute like the posts. It might be difficult to prove, in case of an injury by a transmitter of electricity, whether the

injury was caused by negligence or by pure accident. The statute indicates an intention on the part of the Legislature that these erections in the street, which in many places would constitute a public nuisance if not authorized by the statute, should be permitted only upon condition that those who use them to their own profit should make compensation for damages caused by them. Both the principle involved and the statutory declaration of liability are substantially the same as appear in Rev. Laws, ch. 102, sec. 146, which declares that "the owner or keeper of a dog shall be liable in an action of tort to a person injured by it, in double the amount of damages sustained by him." The keeping of dogs is authorized by law, and in many cases is meritorious. Usually, in individual cases, it is not attended with obvious danger; but the fact that it materially increases the risk of injury to innocent persons is a reason for making dog owners liable for injuries caused by their dogs, even though the owners are free from fault. We are therefore of opinion that this instruction should have been given.

The second instruction requested, that "contributory negligence on the part of the plaintiff is no defense to this action, unless so gross as to amount to fraud," was rightly refused. In this respect the statute is like that last quoted. The statute as to dogs is silent in regard to care on the part of the injured person. But owners of dogs are not insurers against injuries inflicted by them upon persons whose negligence contributes to the injury. *Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645. To make a defendant, under this statute, an insurer against injuries to persons whose own fault is one of the causes of the injury, imposes too great a liability upon the corporation. It would be contrary to the usual rule of liability in actions of tort where the cause of the liability is not more culpable than negligence. The language of this statute does not indicate that this absolute liability to persons injured applies to persons who by their own conduct would be precluded from recovery against a defendant in an action for negligence.

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Revised Laws, ch. 111, sec. 270, in relation to the liability of railroad companies for damages by fires kindled by sparks from locomotive engines, deals with a different kind of subject, and it has been construed a little more strictly. *Bowen v. Boston & Albany Railroad Co.*, 179 Mass. 524, 61 N. E. 141. Railroad companies are held accountable for fires set by their engines under ordinary conditions. The condition of the property does not ordinarily contribute as an active agent to the kindling of the fire. It is a passive state which was contemplated when the statute was passed. That statute leaves the owner entitled to his remedy, unless guilty of gross negligence which is culpable.

The instructions in regard to the duty of the plaintiff in reference to care, and as to what constitutes due care of a plaintiff in a case like this, were correct and sufficient. The third request for instructions was rightly refused.

Exceptions sustained.

LATHROP, J., dissenting.

Negligent location of poles.—The rule, as stated by Mr. Keasbey (*Keasbey on Electric Wires*, sec. 222), is as follows: "Since the erection of a pole in the highway in such a place as to create a dangerous obstruction is not legalized by a general grant of authority to set up a line of poles, it follows that a person setting up a pole in such a place is liable to one who is injured by reason of the dangerous location of the pole while he is lawfully using the highway in the exercise of due care." In the case of *Wolfe v. Erie Telegraph & Telephone Co.*, 33 Fed. 320, the plaintiff was injured by being thrown from a wagon against a telegraph pole located in the highway. The question on appeal was as to the propriety of charging the jury that if the driver, using all the means in his power to stop the horse, while still in the wagon, ran upon a permanent object of a dangerous character in the public street, the company which put up the obstruction was liable for the injury. The court, in considering such instruction, said: "The grant of a permit or direction to locate a pole or post in a street extensively used as a general thoroughfare, both for pleasure drives and for business vehicles, in order to be a valid grant or to be rightfully there, must not only be in accordance with statutes and ordinances, but must also be made subject to the determination of a jury whether the pole or post, so located, is in fact dangerous to the public in the use of the street, including contingencies incident to the lawful use of the same."

The rule as stated in the note appended to the case of *Ela v. Postal Telegraph Cable Co.*, ante, page —, relative to the degree of care to be used by telegraph and telephone companies in the erection and maintenance of wires

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in streets and highways applies equally to the erection and maintenance of poles by such companies. This rule as applied to poles in highways is declared in the case of *Sheffield v. Central Union Telegraph Co.*, 36 Fed. 164, where the trial court in his charge said: "The statutes of Ohio provide that a telegraph company may occupy for its poles a part of the public highway, but must not do it so as to incommode the public in the use of the highway. In the location of its poles in the highway the defendant was required to exercise reasonable care, so as not to incommode persons having the right to use the road for all purposes of travel. This use means the ordinary and reasonable use of the highway for all purposes for which highways are usually used by the public."

Collision with pole due to fright of horse.—It is not the duty of municipalities to so construct and maintain highways that they shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers, without the fault of the municipalities, and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners whose misfortune, if not whose fault, it is that they so happened. *Jackson v. Town of Bellevue*, 30 Wis. 250. And where poles are erected by telegraph or telephone companies in streets and highways with the consent of municipal authorities granted pursuant to statute, and are so located as not to ordinarily obstruct or incommode the public use of such streets or highways, the companies erecting and maintaining them cannot be held liable for damages caused by collision with such poles due to the fact that the horse or horses have become unmanageable without the fault or negligence of such companies. *Roberts v. Wisconsin Telephone Co.*, 3 Am. Electl. Cas. 471, 77 Wis. 589, 46 N. W. 800.

Permission to use highways.—The fact that an electric company has located its poles in a street under the authority of statute and pursuant to a municipal grant or permission so to do, does not, in the absence of any provision of law to that effect absolve it from liability for negligence in the maintenance of its poles. *Cleveland v. Bangor St. Ry.*, 4 Am. Electl. Cas. 346, 87 Me. 259, 32 Atl. 892.

Kyes v. Valley Telephone Co.

KYES V. VALLEY TELEPHONE CO.

Michigan; Supreme Court.

1. INJURY TO MUNICIPAL EMPLOYEE BY FALL OF TELEPHONE POLE; CONTRIBUTORY NEGLIGENCE.—The plaintiff's intestate was a foreman in charge of the work of paving a street. The defendant was engaged in removing its telephone poles from the street. The wires had been removed from a pole, and the guy wire being cut the pole fell and struck and injured the decedent. It was insisted by the defendant that the decedent was guilty of contributory negligence in that he continued to work in a dangerous position with full knowledge that the pole was liable to fall. It was held untenable; the fact that he knew that the wires were cut and removed, and that some of them had fallen near where he was working was not sufficient notice to him that the pole would fall.

Error by defendant from judgment in favor of plaintiff. Decided February 17, 1903; reported (Mich.) 93 N. W. 623.

The deceased, Roderick Kyes, was a general foreman on the work of paving Saginaw street, in the city of Flint. The defendant had been notified to remove its telephone poles from the street, and was engaged at that work. The wires had been removed. The guy wire was cut from the pole, which fell, and struck and injured the decedent. He was at the time engaged in filling a sewer trench. The pole fell upon him, and inflicted injuries from which he died the following day. The injury occurred at 9 o'clock in the morning. He remained unconscious until about 1 o'clock, then regained consciousness, and retained it until the following day, about 2 o'clock, when he became unconscious, and remained so until his death. He was thirty-nine years of age, in good health, and intelligent. He received \$2.50 per day. He left a wife and two children, and a third child was born after his death. The negligence charged is the failure to exercise due care and caution in taking down the telephone pole. Plaintiff recovered a verdict for \$5,000.

Weadock & Purcell, for appellant.

L. T. Durand (*Durand & Carton*, of counsel), for appellee.

Opinion by GRANT, J.:

1. The defendant does not contend that there was no evidence of negligence on the part of the defendant, but upon the trial insisted and requested the court to instruct the jury that the deceased was guilty of contributory negligence. It is insisted that he continued to work in this dangerous position with full knowledge that the

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pole was liable to fall. We cannot concur in this view. It is unnecessary to state the testimony in detail. He was not warned by the defendant that there was any danger. The fact that he knew that the telephone wires were being cut and removed, and that some of them had fallen near where he was at work, was not sufficient notice to him that the pole would fall. He had a right to act upon the belief that when the defendant's employes were ready to take down the pole they would notify him, if there was any danger, or would adopt safe means to take it down. Two men who were walking along the street testified that they said in the presence of three men, including the deceased, who were working there, that they "wouldn't work there a minute;" that it was dangerous. One of the workmen positively denied any such conversation. Besides, the deceased was at work in the trench, from 30 to 35 feet distant, and perhaps paying no attention to the conversation. One may be in position to hear, but it does not follow that he does hear or that he ought to hear. That depends upon how his mind and attention are occupied. The testimony on this point was in sharp conflict, and was properly left to the jury. *Menard v. Ry. Co.*, 150 Mass. 387, 23 N. E. 214; *Horn v. Ry. Co.*, 4 C. C. A. 346, 54 Fed. 301.

2. This action is brought under what is known as the "Survival Act" (section 10,117, Comp. Laws), which reads as follows:

"In addition to the actions which survive by the common law, the following shall also survive: that is to say, actions of replevin and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, for negligent injury to persons, for damage done to real and personal estate, and actions to recover real estate where persons have been induced to part with the same through fraudulent representations and deceit."

The court instructed the jury that:

"The plaintiff is entitled to recover the same damages that the deceased would have been entitled to recover had he brought the action in his lifetime. That is to say, you may award such damages as, in your judgment, would be a fair compensation for the loss sustained by the deceased by reason of the injuries he received. You are to consider his age, his habits of industry, his ability to labor, his capacity to earn money, and the wages he was in the habit of earning when injured, and the length of time he would probably have lived had he not been injured; the loss he sustained by reason

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of being deprived by such injuries of the ability to labor and earn money during the time he probably would have lived, had he not been injured—using your best judgment, under all the facts and circumstances in the case, in arriving at what would be a just compensation for such loss.”

In *Sweetland v. Chicago & Grand Trunk Ry. Co.*, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568, it was decided that the statutes do not give two rights of action. The statutes were again before the court in *Dolson v. Lake Shore, etc., Ry. Co.*, 87 N. W. 629, and we again so decided, and held that where death is not instantaneous the administrator recovers under the Survival Act, and that where the death is instantaneous the recovery, if any, must be under the death act (sections 10,427, 10,428, Comp. Laws). Defendant now insists that plaintiff's measure of damages, in addition to compensation for pain, suffering, and medical attendance, is what the deceased might have earned between the time of his injury and his death. We said in the *Dolson case* that the administrator could recover “the full measure of damages for the benefit of the next of kin.” When an action survives, the representatives of the deceased are entitled to recover the same measure of damages that he could have recovered if he had lived to bring his suit to a successful issue. *Muldowney v. Ills. Centl. Ry. Co.*, 36 Iowa, 462; *Maher v. Phil. Traction Co.*, 181 Pa. 390, 37 Atl. 571; 8 Am. & Eng. Enc. L. (2d ed.), 908, par. 11. The instruction was correct.

We find no prejudicial error in the rulings of the court upon the testimony.

The judgment is affirmed. The other justices concurred.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. V. INGRANDO.

Texas; Court of Civil Appeals.

1. INJURY TO PROPERTY; TELEPHONE POLE FALLING IN AN UNUSUAL STORM.—

Where a telephone pole, ordinarily fit and sufficient for the purposes for which it was erected, falls during a storm of unprecedented violence, the company is not liable for the damages caused thereby. The mere fact that the company could have provided poles of sufficient strength to withstand the storm as shown by the fact that some of the poles erected by it were not broken by the storm, did not require it to use only poles of sufficient strength to withstand such a storm, and its failure to do so was not negligence.

Appeal by defendant from judgment for plaintiff. Decided December 13, 1901; reported 27 Tex. Civ. App. 400, 65 S. W. 1085.

Harris & Harris, for appellant.

Opinion by PLEASANTS, J.:

This suit was brought by appellee to recover of appellant damages for injury to a building owned by appellee, and alleged to have been injured through the negligence of appellant in placing and erecting near said building an insufficient and insecure telephone pole, which fell, and caused the injury complained of. The defendant answered by general denial, and by special plea averred that said pole was a large, sound, and safe pole, properly guyed and stayed, and was of ample size and of sufficient strength to carry the load placed upon it in any ordinary conditions of weather; and that the storm of September 8th, during which said pole was broken, was an act of God, which defendant could not foresee, and that defendant was not required to construct its line so as to withstand a storm of such violence. The cause was tried in the court below without the intervention of a jury, and judgment rendered for the plaintiff for the sum of \$215. Briefly stated, the facts disclosed by the record are as follows: The pole in question was erected by appellant on the edge of the sidewalk, and ran up

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through the awning in front of appellee's building in the city of Houston. It was 50 feet long, and 20 inches in diameter at the base, and was placed 6 1-2 feet in the ground. At the time it was put up (about three years before the injury complained of) it was properly inspected, and found to be a good, sound pole, suitable in every way for the purpose for which it was used, according to the testimony of the only witness who knew anything about the condition of the pole at the time it was put up. During the storm of September 8, 1900, the pole broke just where it passed through the awning of appellee's building, and also a short distance above the awning. The top portion of the pole, after it broke in two, was held suspended by the wires which were fastened to it. The awning fell, and the end of appellee's building was either pulled out by the wires which ran over it and were pulled down by the weight of the pole suspended to them, or was battered down by the suspended portion of the pole as it was blown to and fro by the wind. The evidence shows that appellee was damaged in the amount adjudged him by the court below. Three witnesses testified that they examined the broken pole on the morning after the storm, and that it had the dry rot. Two of these witnesses say that it was rotten near the center, but they do not state to what extent, but they say that it appeared perfectly sound on the outside. The other witness says that he saw a rotten place on one side of the pole. He did not examine to see how far the rot extended into the pole, but that it extended four or five inches toward the center. The undisputed evidence shows that the storm of September 8, 1900, at Houston was of such unprecedented violence and fury as to come within the category of occurrences denominated the act of God. Four witnesses testified that they had examined the pole after it was broken; that they saw no indication of dry rot, and the pole was in a good, sound condition. It was a white cedar pole, which was the best kind of timber to resist dry rot in this climate, and when placed by the defendant had been examined and selected as suitable for a corner pole. The trial court, in his conclusions of fact, finds that the pole was rotten and unsubstantial at the places where it broke, and that the defects were the cause of the breaking of the pole,

when other poles of less apparent strength were uninjured; and the breaking of the pole by reason of its unfit and rotten condition was the direct and proximate cause of the injury to plaintiff's property. This is not a finding that the pole was so defective as to render it unfit and insufficient, under ordinary conditions, for the purpose for which it was used, and, in view of the undisputed evidence as to the character of the storm in which the pole was broken, this finding of fact is insufficient to authorize a judgment in favor of the plaintiff. In our opinion, the evidence fails to show that the pole was insufficient under ordinary conditions, and, had the trial court passed upon this issue, he must have so found. We think it clear that the court below, in rendering judgment for the plaintiff, did so upon the theory that, if the pole was defective to such an extent that it was too weak to withstand the storm of Sept. 8, 1900, when other poles erected by the company did withstand the storm, and that the breaking of the pole caused the damage to plaintiff's property, he was entitled to a judgment, regardless of the character of the storm, or of whether the pole may not have been strong enough to resist the force of any ordinary storm. It is unnecessary to cite authority upon the proposition that if the pole was, under ordinary conditions, suitable and sufficient for the purpose for which it was used, the fact that it was not strong enough to resist a storm of such unusual and unprecedented violence as that in which it was broken, would not show negligence on the part of defendant in using said pole, because the defendant was not required to foresee such an occurrence, or to construct its lines with reference to same. The mere fact that it was possible for the defendant to have procured poles of sufficient strength to withstand the storm, as shown by the fact that some of the poles erected by it were not broken by the storm, did not require it to use only poles of sufficient strength to withstand a storm of this character, and its failure to do so was not negligence.

The judgment of the court below will be reversed, and this cause remanded for a new trial; and it is so ordered. Reversed and remanded.

Simonton v. Citizens' Electric Light & Power Co.

SIMONTON V. CITIZENS' ELECTRIC LIGHT & POWER CO.

Texas; Court of Civil Appeals.

1. **SPIKES IN ELECTRIC LIGHT POLES; INJURY TO CHILD IN ATTEMPTING TO CLIMB.**—An electric light company is not liable for injuries caused to a child attempting to climb an electric light pole erected in a city street, because of the fact that such pole was equipped with spikes from a point near the ground so as to allow ascent for the purpose of placing and repairing wires. Poles so constructed and erected are not within the rule applicable to the maintenance of attractive nuisances.

Appeal by plaintiff from judgment for defendants. Decided March 27, 1902; reported 28 Tex. Civ. App. 374, 67 S. W. 530.

Lovejoy, Sampson & Malevinsky, C. E. & A. E. Heidingsfelder, and Burke & Griggs, for appellant.

Hutcheson, Campbell & Hutcheson, for appellees.

Opinion by PLEASANTS, J.:

Appellant brought this suit to recover damages for injuries to the person of his minor son, alleged to have been caused by the negligence of the defendants. The acts of the defendants which are alleged to have caused the injury to plaintiff's son, and are charged to be negligent, are thus stated in plaintiff's petition:

"(1) That heretofore, to wit, on or about the 27th day of August, A. D. 1899, and for a long time prior thereto, the said defendants had illegally and unlawfully erected and maintained a certain large electric light pole upon a sidewalk on a street in the city of Houston, known as Congress avenue, and located between certain streets in said city known as Chenevert and Hamilton streets, which said pole was near the home of the plaintiff, in said city of Houston, as aforesaid; that said pole, together with many others in the city of Houston of a similar character were erected and used by said defendants in the conduct of their said business, which the plaintiff alleges to be a transmission and distribution of electric currents for lighting purposes for hire; and that said pole, and the wires erected and maintained on said pole, were used for the purpose of furnishing electric lights to private citizens in the city of Houston, and not for any public use or purpose.

"(2) That before or after the erection of said pole the defendants illegally and unlawfully placed or drove a great number of iron spikes in said pole,

commencing about twenty inches from the ground or sidewalk, and leaving a space of about twenty inches between each spike, forming a row or rows of spikes or foot rests, reaching to a point near the top of said pole; that said spikes or foot rests so placed and left remaining protruded or stood out from the sides or surface of said pole to the extent of five or six inches, forming the steps of a sort of ladder, which was primarily intended to be used by the employees of said company in climbing said pole for work thereon; that said pole was erected and maintained in said condition, not upon any private property of the defendant company, but upon a public sidewalk or street in said city of Houston as aforesaid, and upon a pathway that was used and frequented by the citizens of Houston at all times of the day and night.

"(3) That said spikes or steps were placed or started so near the ground that children of tender years, and with absolute want of discretion, or knowledge of the danger resulting therefrom, could climb said poles with the same facility and ease as an adult, and that said poles were thus left and maintained by the defendants, with said spikes or steps so arranged and constructed as to prove a dangerous menace to the lives and limbs of children in said neighborhood.

"(4) That the manner of construction and maintenance of said pole as aforesaid, and its condition, was a direct invitation to children in said neighborhood, and particularly to the plaintiff's child, Gussie Simonton, who was a child of immature discretion, and without judgment or knowledge as to the danger therewith, to climb said pole and play thereon; that it was well known to the defendants, their servants, agents and employees, that the children in said neighborhood did use said pole to climb and play thereon, and that notwithstanding such knowledge on the part of the defendants, their servants, agents and employees, they maintained said pole in said dangerous and hazardous condition, and invited the children in said neighborhood to indulge in the pastime of climbing upon said pole; that said pole, in its condition, was unusually attractive and seductive to children of tender years, and it was especially and unusually calculated to attract, and it did attract, small children, and appealed to their instinct to play, and it tempted and lured them, and thereby caused them to climb thereon, and in other ways made it the means of children's sport and diversion, they being ignorant of the danger thereby incurred.

"(5) That on or about the said 27th day of August, A. D. 1900, the plaintiff's child, Gussie Simonton, being at that time of the age of seven years, and lacking mature judgment and discretion, and being unmindful of the danger and hazard connection therewith, while playing with several children around and about said pole, as was their habit and custom, the said Gussie Simonton climbed on said pole, and onto the steps or spikes attached thereto, as aforesaid, and that whilst the said Gussie Simonton was on said pole he lost his balance and was precipitated from a great height on said pole to the sidewalk below, fracturing his skull and breaking his arm, injuring his spine and back and internal organs, to wit, his liver, kidneys, and also greatly bruising and injuring his legs and body; that his injuries so received at said time and place have rendered said Gussie Simonton a cripple, and, in

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addition to the injuries hereinbefore set forth, impaired his eyesight and mental faculties.

"(6) The injuries to the said Gussie Simonton, as aforesaid, were directly and proximately caused and occasioned by the negligence and carelessness of the defendants, their servants, agents and employees, in that they negligently and carelessly, and without any regard to the life or security of minor children of immature judgment and discretion who lived in the neighborhood of said pole and played thereon, equipped and maintained said pole with said spikes or steps thereon as aforesaid in a dangerous and hazardous condition, and thus directly invited said Gussie Simonton into a place of danger and hazard, causing his injuries as aforesaid."

The defendants demurred generally and specially to the petition, the special exceptions being as follows:

"(1) And, further answering, this defendant especially excepts to that part of paragraph 1 of plaintiff's petition which alleges that the said defendant had 'illegally and unlawfully' erected an maintained, etc.; that the said statement is not a pleading of fact, but is merely a conclusion of law, and should be stricken from its pleadings; and of this he prays the judgment of the court.

"(2) And, further answering, this defendant especially excepts to that part of paragraph 2 of plaintiff's petition which alleges that defendant 'illegally and unlawfully' placed or drove a great number of iron spikes in said poles; that the said allegation is not an allegation of fact but a conclusion of law; that the same should be stricken from the pleading of the plaintiff; and of this he prays the judgment of the court.

"(3) And, further answering, this defendant especially excepts to paragraph 3 of plaintiff's petition, inasmuch as it states 'that said poles were thus left and maintained by the defendant with said spikes or steps so arranged and constructed as to prove a dangerous menace to the life and limbs of children living in said neighborhood.' That said allegations are not allegation of fact, but are mere conclusions from the facts not stated, and are not proper pleading; and of this prays the judgment of the court.

"(4) This defendant further especially excepts to that portion of paragraph 4 of plaintiff's petition which states that the manner of construction and maintenance of said poles was a direct 'invitation' to children in the said neighborhood, because said allegation is not an allegation of fact, but a mere conclusion or inference; and of this he prays the judgment of the court.

"(5) This defendant further especially excepts to paragraph 6 of plaintiff's petition—that the said paragraph 6 is not a pleading of facts, but a pleading of conclusion of law and of fact; and of this he prays the judgment of the court."

The court below sustained the general demurrer and all of the special exceptions to the petition, and, plaintiff declining to amend, his suit was dismissed.

Under the common law no duty is imposed upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured, his only duty to persons thus entering upon his premises being to abstain from willfully injuring them. This rule of law applies to infants with the same force that it does to adults, but in certain classes of cases an invitation by the owner to enter upon his property will be implied by estoppel in favor of children from facts that would raise no such implication as to adult persons. *Dobbins v. Railroad Co.* (Tex. Sup.), 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. Ordinarily an invitation will not be implied unless the property is designed or used by the owner for public purposes, such as a hotel or store where a mercantile business is conducted, and the person entering upon the premises is carrying out a purpose or design which is to the common interest or advantage of the owner and himself. *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Bennett v. Railroad Co.*, 102 U. S. 584, 26 L. Ed. 235. But in the case of injury to children our courts have gone much further, and have established the doctrine that an invitation may be implied by estoppel, even against the intention of the owner, if such owner maintains upon his premises, where children are likely to be, something which, on account of its nature and surroundings, is especially and unusually calculated to attract, and does attract, them, and induce them to go upon his premises. *Railway Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28. Appellant contends that under this rule the facts stated in the petition are sufficient to authorize a finding that his son climbed upon appellee's pole by the implied invitation of the latter. We cannot concede the soundness of this contention. In considering the question of the sufficiency of the petition, we must disregard the statement by the pleader of mere legal conclusions, and test the petition solely by the facts stated therein. The facts pleaded do not show that the pole which is alleged to have been negligently maintained by the defendant was

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especially or unusually attractive, or that such pole was not constructed and maintained in the manner in which poles of this character are ordinarily constructed throughout the country. On the contrary, the petition alleges that the defendant maintained its other poles in the city of Houston in the same manner. It is alleged that spikes are driven in the pole from a point near the ground to a point near the top of the pole, so as to form a kind of ladder; but there is no allegation that such is not the proper and necessary method of constructing poles which are used for the support of electric wires, in order that the servants of the defendant might be enabled to reach the top of the pole whenever it became necessary to place or repair the wires, which, as the petition alleges, was the primary object of the defendant in so placing said spikes in the pole. It is a matter of common knowledge that this is the condition in which poles used for the purpose for which this pole was used are ordinarily maintained. In the case of *Railway Co. v. Morgan*, *supra*, Judge Denman says:

"Where the owner makes use of his property as others ordinarily do throughout the country, there is not, in legal contemplation, any evidence from which a court or jury may find that he had invited the party injured thereon, though it be conceded that his property was calculated to, and did, attract him. It is only when one maintains upon his premises something which, on account of its nature and surroundings, is especially and unusually calculated to attract, that the court or jury may find an invitation."

In all of the *Turntable cases* the invitation is implied from the fact that by reason of the turntable being left unlocked, so that it could be, and was, used by children as a plaything, it was especially and unusually attractive. No issue of negligence could arise on the allegations of this petition by reason of the proximity of defendant's pole to the public highway. Plaintiff's son was not injured while using the highway, but while going upon and using for purposes of amusement the property of defendant. *Gay v. Railroad Co.*, 141 Mass. 407, 6 N. E. 236. It has been held that railway cars and cattle pens and chutes used in the herding of cattle are not such specially and unusually attractive structures as to come within the doctrine of the *Turntable cases*, and a child going

upon such structures is a trespasser, and cannot recover for injuries caused by the negligence of the owner of such property, unless the act causing the injury be willful. *Barney v. Railroad Co.* (Mo.), 28 S. W. 1069, 26 L. R. A. 847; *Railroad Co. v. Cunningham* (Tex. Civ. App.), 26 S. W. 474. We believe that it would be unwise to extend the doctrine of the *Turntable cases* to cases of this character. It would seriously retard the material progress and cripple the business interests of the country if persons owning and operating public utilities which, from their very nature, require the use of structures and appliances placed in proximity to public highways, should be forbidden to use or maintain any structure or appliance of a kind calculated to attract and allure children to attempt their use as playthings, and which, when so used, becomes dangerous. As said by Judge Gaines in the case of *Railroad Co. v. Edwards* (Tex. Sup.), 36 S. W. 431, 32 L. R. A. 825, we believe that the doctrine upon which the *Turntable cases* have been sustained goes to the limit of the law, and sound public policy forbids that it be further extended.

We are of opinion that the demurrers to the petition in this case were properly sustained, and the judgment of the court below is affirmed. Affirmed.

Injury to person caused by vehicle striking telephone pole in highway; liability of telephone company; contributory negligence.—In the case of *Watts v. Southern Bell Telephone & Telegraph Co.*, 100 Va. 45, 40 S. E. 107, it appeared that the plaintiff while driving along a highway on an intensely dark night came in contact with a telephone pole which had been erected by the defendant eighteen feet from the margin of the highway, and nearly in the center thereof. This collision frightened the plaintiff's horse, which became unmanageable and ran away, causing the wagon to collide with another telephone pole of the defendant on the margin of the highway some distance further on. The result was that the plaintiff was thrown violently from the wagon and his ankle broken. Although the immediate cause of the accident was the second pole, which was lawfully placed on the side of the highway, nevertheless the first pole was the natural and proximate cause of the accident, because, but for the collision with it the accident would not have occurred. It was contended by the defendant that the highway, in the center of which it had placed its pole, had been abandoned, and a new road provided by the board of supervisors at that point, by the purchase of a strip of land along the western margin of what is known

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as the old road, and that the pole in question was placed in the old road with the knowledge and consent of a member of the board of supervisors. But the evidence showed that the old road was in continued use by the traveling public. It did not appear that the location of the old road was altered in the manner prescribed by chapter 43 of the Virginia Code. It was held that there was no such discontinuance of the road as to exempt the telephone company from liability for injuries occasioned by the pole erected by it in the center of such old road. The fact that the pole was placed in the road with the consent of a supervisor is not a defense, since the supervisor was not authorized to permit the defendant to obstruct the ordinary use of the road by the erection of its poles. It was also held in this case that the plaintiff was not guilty of contributory negligence for a failure to notice the location of the pole. The darkness of the night was a sufficient excuse for his failure to see it.

CONTACT WITH LIVE WIRES IN STREETS.**COLBURN V. MAYOR, ETC., OF CITY OF WILMINGTON.**

Delaware; Superior Court of Newcastle.

1. **LIABILITY OF MUNICIPALITY FOR DEATH OF HORSES CAUSED BY CONTACT WITH LIVE WIRE.**—The plaintiff's horses were killed by coming in contact with a highly charged electric wire, which had been broken and was hanging down in the street. The defendant contended that the wire was broken down by a sleet storm of unusual severity, and that when this became known, policemen remained constantly on guard near the broken wire, until after the accident in question, and that the plaintiff's driver was given timely notice of the danger. It was held that if the electric wire was the property of the defendant and was broken down and suspended in the street by reason of the sleet adhering to it, and without any neglect or default of the defendant, the defendant would not be responsible for such breaking or suspension, as this would be what is called "an act of God;" and that if the driver of the plaintiff's horses was given due and timely warning of the danger, the defendant would not be liable for any injury resulting from a disregard of such warning.

Charge to jury in an action on the case for negligence. Rendered December 1, 1903; reported 56 Atl. 605.

Henry C. Conrad and Daniel O. Hastings, for plaintiff.

Robert G. Harman, City Sol., and Baldwin Springer, Asst. City Sol., for defendants.

SPRUANCE, J. (charging jury):

This action was brought by Chas. H. Colburn, the plaintiff, against the mayor and council of Wilmington, the corporation defendant, for the recovery of damages for the death of two horses, and injury to their harness, alleged to have been occasioned by the negligence of the defendant. It is not denied that the horses of the plaintiff, attached to a loaded furniture wagon, were killed on the 21st of February, 1902, at or near the intersection of Dupont street with the southerly side of fourth street,

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in the city of Wilmington, by coming in contact with a highly charged electric wire, which had been broken, and was hanging down into the street. The plaintiff claims that said wire was the property of the defendant, and that, after due notice of its broken and dangerous condition, the defendant negligently suffered it so to remain, and that, without sufficient warning, and without the fault of the plaintiff's driver, his horses came in contact with said wire and were killed. The defendant contends that said wire was broken down by a sleet storm of unusual severity; that very soon thereafter this became known to two of the city police; that notice was at once telephoned to police headquarters, and that one or the other of said policemen thereafter remained constantly on guard near the broken wire until after the accident in question; that he gave to the plaintiff's driver due and timely notice of his danger; and that there was no negligence whatever on the part of the defendant.

It is the duty of the corporation defendant, through its proper officers and agents, to exercise due care and diligence in keeping the public streets of the city free from dangerous obstructions, and in keeping its electric wires along such streets in such condition as not to interrupt or endanger public travel. The care and diligence required of the defendant in both these respects is reasonable care and diligence, proportioned to the danger or mischief liable to ensue from the omission of such care and diligence.

But, on the other hand, the defendant is not an insurer against all injuries which may result from obstructions in the public streets. It is liable only for such injuries as are the result of its negligence or default in the performance of some duty imposed upon it by law.

If the electric wire in question was the property of the defendant, and was broken down and suspended in the street by reason of the sleet adhering to it, and without any neglect or default of the defendant, the defendant would not be responsible for such breaking or suspension, as this would be what is called an "act of God."

If, after notice of the dangerous condition of the wire, whoever may have been the owner of it, the defendant did not within a reasonable time remove or repair the same, or take proper precautions to notify travelers or protect them from the danger, the defendant would be guilty of negligence.

If, at and immediately before the time of the accident, a police officer of the city, near the suspended wire, gave due and timely warning of the danger to the driver of the plaintiff's wagon, the defendant would not be liable for injury sustained by reason of the disregard of such warning, or other negligence on the part of the driver.

Negligence is not presumed, and the burden of proving it is upon the party by whom it is alleged.

Where the injury complained of is the result of the negligence of both parties, the plaintiff is held to be guilty of contributory negligence, and cannot recover, as the law will not, in such case, undertake to measure and balance the degree of responsibility attributable to each of the parties.

In considering the question of negligence, the jury should have regard to the particular conditions and circumstances attending the accident. The driver of a loaded wagon, going down grade upon a sleety pavement, and with brakes coated with ice, should proceed at a more moderate speed and with more caution than would be required under ordinary circumstances.

Where the evidence is conflicting, the jury should reconcile it, if they can; but, if they cannot do so, they should give credence to so much of it as, in their opinion, is entitled to belief.

The verdict should be for that party in whose favor is the preponderance or greater weight of evidence.

If the verdict should be for the plaintiff, it should be for the value of the property injured and destroyed, as the same appears from the evidence.

Quincy Gas & Electric Co. v. Baumann.

QUINCY GAS & ELECTRIC CO. v. BAUMANN.

Illinois; Supreme Court.

1. **INJURY TO PEDESTRIAN COMING IN CONTACT WITH LIVE ELECTRIC WIRE; EVIDENCE.**—The plaintiff, a child of eleven years of age, while passing along the street, came in contact with an electric light wire belonging to the defendant which had broken so that the ends fell to the ground near the sidewalk, and he was severely burned thereby. During the trial the clothing worn by the plaintiff at the time he was injured were offered in evidence, and it was held admissible since it tended to illustrate the manner in which the injury was occasioned.

Appeal by defendant from judgment for plaintiff. Decided June 16, 1903; reported 203 Ill. 295, 67 N. E. 807.

Govert, Pape & Govert, for appellant.

McCrorry & Dines and *Vandeventer & Woods*, for appellee.

Opinion by WILKIN, J.:

This is an appeal from a judgment in the Appellate Court for the Third District affirming a judgment rendered in the Circuit Court of Adams county against the appellant for a personal injury sustained by Bernard Baumann, the appellee. Appellant on July 30, 1901, was operating an electric light plant and lighting the streets of the city of Quincy. One of its wires suspended between poles on Adams street, in that city, charged with electricity, broke, and the ends fell to the ground near the sidewalk. The first count of the declaration charges that the company permitted the broken wire to remain upon the sidewalk for two hours, and that the plaintiff, exercising due care, came in contact with one end of the wire so charged with electricity, and was thereby seriously injured. The second count charged that the company carelessly permitted the wire to become weak, worn and defective, and by reason of its worn condition it broke and fell to the sidewalk, etc. The third charges that the wire was suspended so that it came in contact with a street car trolley pole, and was permitted to rub

against and come in contact with a bolt, tap or nut on that pole, and that thereby the insulation on the light wire was burned or rubbed off, and that the company permitted the wire to so remain uninsulated and exposed, coming in contact with the pole, for a month prior to the injury, and that currents of electricity passed through the pole when it was wet from the rains, to the ground, causing the pole to take fire and break the wire, etc. The evidence shows that the electric wire for more than a month prior to this date was in contact with the street car pole, producing an arc, or, as some of the witnesses describe it, causing the pole to burn, and it tended to show that arcing caused the wire to burn apart. Appellee, a child eleven years old, while passing along the street, carrying a dinner basket, came in contact with the live wire lying upon the street, and was severely burned, resulting in great injury, more or less permanent. The jury returned a verdict in favor of the plaintiff for \$10,000, upon which judgment was entered, motion for new trial being overruled.

Upon this further appeal from a judgment of affirmance in the Appellate Court, among the many errors assigned, it is urged that the court erred in the admission and exclusion of evidence. During the trial the waist and pair of pants worn by the plaintiff at the time he was injured were offered in evidence, and it is contended that the court erred in admitting them over the objection of the defendant. We perceive no error in this, as the clothing, identified as being worn by the plaintiff at the time of the accident, tended to illustrate the manner in which the injury was occasioned. Its introduction in evidence was at least a matter in the discretion of the court. *Tudor Ironworks v. Weber*, 129 Ill. 535, 21 N. E. 1078; *Painter v. People*, 147 Ill. 444, 35 N. E. 64.

(Remainder of opinion relates to matters of practice, and is therefore omitted.)

ECONOMY LIGHT & POWER CO. v. HILLER.*Illinois; Supreme Court.*

1. **INJURY TO PEDESTRIANS FROM CONTACT WITH BROKEN TELEPHONE WIRE HANGING ACROSS ELECTRIC LIGHT WIRE; JOINT LIABILITY.**—The electric current carried by a telephone wire is not dangerous under ordinary conditions, if it was not in contact with any other wire, but if an electric light wire should come in contact with the telephone wire the result would be to impart to it a current of electricity which would be dangerous. Where the pole on which an electric light wire is suspended was shown to be unfit and not braced as it ought to have been, and it appeared that after a heavy rain storm the electric light wire had sagged and come in contact with the telephone wire, resulting in the telephone wire being burned off at some distance from the point of contact and had fallen across the electric light wire to the ground, and the plaintiff was injured by coming in contact with such broken telephone wire, it is sufficient to show a concurrent neglect upon the part of both the telephone company and the electric light company, and that the negligence was joint in its character.
2. **NEGLIGENCE OF TELEPHONE COMPANY IN FAILING TO REPAIR BROKEN WIRE.**—The negligence of the defendant telephone company in this case consisted in its failure to repair the wire, which from the evidence was shown to have been burned out to the probable knowledge of the company, and to remove the dangerous wire before the accident.
3. **INSTRUCTION TO JURY AS TO JOINT NEGLIGENCE.**—An instruction to the jury to the effect that if from the evidence it appears that the plaintiff at the time of such injury was in the exercise of reasonable care for his safety, "and if you further believe from the evidence that such injury, if proved, was caused by or through the negligence of the defendants, or either of them, as alleged in either count of the declaration, then the plaintiff is entitled to recover such damages as you believe, from the evidence, will compensate him for the injury sustained," was correct so far as in saying that if the plaintiff proved the allegations of either count of his declaration, and was injured by the negligence of the defendants, or either of them, he would be entitled to recover his damages, but was faulty in not limiting the recovery to the defendant proven guilty. But this instruction, although faulty, is not harmful where the court also instructed the jury as to the verdict which they should render if they should find one of the defendants guilty and the other not guilty.

Appeal by defendants from judgment for plaintiff. Decided June 16, 1903; reported 203 Ill. 518, 68 N. E. 72.

Garnsey & Knox, for appellants.

J. W. D'Arcy, for appellee.

Opinion of CARTWRIGHT, J.:

Appellee, a minor, suing by his next friend, recovered a judgment against appellants, the Economy Light & Power Company, a corporation maintaining poles and wires in the streets of the city of Joliet and furnishing electric light and power, and the Chicago Telephone Company, a corporation also maintaining poles and wires in said streets and furnishing telephone service, the recovery being for injuries received by appellee from contact with a broken telephone wire hanging across an electric light wire. The Appellate Court for the Second District affirmed the judgment, and appellants prosecuted separate appeals from the judgment of the Appellate Court.

At the close of the evidence each defendant asked the court to give a peremptory instruction to the jury to find it not guilty. The court refused to give the instructions. It is contended that both instructions ought to have been given, because the injury to the plaintiff was not the result of the joint negligence of the two defendants. The rule is that all persons who join in the commission of a wrong are jointly and severally liable, and the injured party may sue all or any of them. The joint liability in such a case is not of the same nature as a joint liability for the breach of a contract, but, where two or more are sued, the wrong complained of must be joint in its character. One is never liable for the wrong of another, and if their acts are entirely distinct and separate there cannot be joint liability. *Yeazel v. Alexander*, 58 Ill. 254; *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586; *Chicago City Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478. There are some wrongs, like slander, which cannot be joint, but the great majority of torts may be committed jointly, and where different persons owe the same duty, and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint, and both be held liable.

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We are of the opinion that the injury in this case was the result of the joint negligence of the two defendants. At the corner of Hickory and Division streets, in the city of Joliet, the wires of the defendant, the Economy Light & Power Company, cross above the wires of defendant, the Chicago Telephone Company. The electric current carried by the telephone wire would not be dangerous, under ordinary conditions, if it was not in contact with any other wire; but if the electric light wire should come in contact with the telephone wire, the result would be to impart to it a current of electricity which would be dangerous. While neither one had any direct control or management of the wires of the other company, it was the duty of each to use proper care to protect the public against the danger of accident from its own wires. Both companies were using electricity, and the current of the Economy Light & Power Company was so powerful as to be dangerous to human life. In case of the use of a highly dangerous agent like electricity, the party using it must exercise such a degree of care as is commensurate with the danger to prevent injury to the public. *Alton Railway & Illuminating Co. v. Foulds*, 7 Am. Electl. Cas. 548, 190 Ill. 367, 60 N. E. 537. The wires of the telephone company were so related to the electric light wires that contact between them would produce dangerous results. At the place where the wires crossed at Hickory and Division streets the insulation of the electric light wires was bad, and in many places was entirely off, or ragged, and hanging from the wire. The telephone wires beneath were not protected in any way from receiving the deadly current if the wires came in contact. The pole on which the electric light wires were suspended was unfit and not braced as it ought to have been. There had been a guy wire to keep it erect, which was gone, and on the morning of the accident the pole was leaning over at an angle of 45 degrees, letting the electric light wire down to within two or three inches of the telephone wire. There had been a heavy rain storm during the night, and the electric light wires had evidently sagged and come in contact with the telephone wires, with the result that the telephone wire was burned off at some distance from the point of contact,

and fell across the electric light wires to the ground. The telephone wires passed through the branches of shade trees, and were not insulated, so that the wire was liable to burn out if it touched the trees carrying the current from the electric light wires in wet weather. It is uncertain how long the pole had been leaning, but it had been unfit before the accident, and no safeguard of any kind had been provided at that place, or where the telephone wires passed through the trees, or where they were above the electric light wires at the place where the telephone wires burned off. The evidence showed the common duty owing by both of the defendants to the public, resulting from the situation and proximity of the wires, and the use of the dangerous agent by the Economy Light & Power Company. The evidence tended to show a concurrent neglect of the common duty which rested upon both the defendants, and the negligence was joint in its character.

The telephone company also insists that the peremptory instruction asked by it should have been given on account of the want of negligence on its part. Counsel for that company say that it could not repair the wires of the Economy Light & Power Company, nor straighten the leaning pole without becoming a trespasser; that it could not enjoin that company from maintaining its poles and wires in a dangerous condition, or compel it to make them safe, and that all the telephone company could do to obviate danger would be to remove its wires from the street when it found they were in danger of contact with the electric light wires. They so construe the decision in *Chicago Telephone Co. v. Northwestern Telephone Co.*, 8 Am. Electl. Cas. 81, 199 Ill. 324, 65 N. E. 329. We find nothing in that decision justifying the conclusion that the telephone company would have to remove from the street, and would have no protection from the negligence of the Economy Light & Power Company, or the improper construction and maintenance of its wires, under such circumstances as are shown by the evidence. It was held in that case that a company operating a telephone system was entitled to be free from unreasonable or unnecessary interference such as would prevent the practical opera-

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tion of its telephone system. It might require more care on the part of the telephone company if there were electric light wires in the street which were liable to come in contact with its wires and cause injury, and the duty of increased care and caution would not furnish a good reason for enjoining the putting up of electric light wires; but we have not decided that there could be no protection to the property of the telephone company against negligence or improper construction or maintenance of poles or wires by another company. There was evidence tending to show that the telephone company would probably know when its wires were burned out or its system interfered with, and after the wire was burned out in the night time, and was hanging in the dangerous condition in the public street, nothing was done to repair the damage or remove the danger at 8.30 o'clock the next morning, when the accident occurred. The court could not say, as a matter of law, that proper inspection and diligence on the part of the telephone company did not require it to discover the dangerous condition and remove the danger to those using the street before that time. The question whether the company ought to have discovered the condition and made repairs in time to prevent the accident was finally settled by the judgment of the Appellate Court. There was no error in refusing to give the peremptory instructions asked.

The court, at the request of the plaintiff, gave to the jury the following instruction: "If the jury believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of his declaration by a preponderance of the evidence, and if the jury believe, from the evidence, that the plaintiff was injured as alleged, and if you believe, from the evidence, that the plaintiff, at the time of such injury, was in the exercise of reasonable care for his safety, and if you further believe, from the evidence, that such injury, if proved, was caused by or through the negligence of the defendants, or either of them, as alleged in either count of the declaration, then the plaintiff is entitled to recover such damages as you believe, from the evidence, will compensate him for the injury sustained."

This instruction was correct in saying that if plaintiff proved the allegations of either count of his declaration, and was injured by the negligence of the defendants, or either of them, he would be entitled to recover his damages, but it was faulty in not limiting the recovery to the defendant proved guilty. It did not directly authorize a recovery against both for the negligence of one, and, so far as the Chicago Telephone Company is concerned, the court gave two instructions to the effect that unless it appeared from the evidence that said company was guilty of the negligence charged in the declaration, or if it appeared that the accident occurred by reason of the act or neglect of some other party or company, they should find it not guilty. The court also gave to the jury certain forms for their verdict in case they should find one of the defendants guilty and the other not guilty, so that we think the jury could not have been misled, and that the other instructions, read with the defective one as one charge, supplemented it and supplied the defect as to the Chicago Telephone Company. So far as the Economy Light & Power Company is concerned, there could have been no other conclusion from the evidence than that which was reached by the jury, and we cannot regard the instruction as harmful to that company in view of the evidence. The pole was not supported, and was in a condition wholly unfit for sustaining the electric light wires before and at the time of the injury. The insulation of the wires was very bad, and was hanging in rags at that place and other places in the immediate vicinity, as well as over the city generally. That the Economy Light & Power Company was guilty of negligence causing the injury is beyond question.

An instruction that the questions of negligence on the part of the defendants and care on the part of the plaintiff were questions of fact for the jury is objected to. The instruction further explained to the jury that it was their duty and province to determine those questions of fact under the law and evidence in the case, and there was no error in giving that instruction.

The judgment of the appellate court is affirmed. Judgment affirmed.

Chaperone v. Portland General Electric Co.

CHAPERONE V. PORTLAND GENERAL ELECTRIC CO.

Oregon; Supreme Court.

1. INJURIES TO HORSE AND VEHICLE BY CONTACT WITH BROKEN WIRE; SUFFICIENCY OF COMPLAINT.—A complaint alleging that the act complained of consisted in carelessly and negligently allowing and permitting a wire heavily charged with electricity to become broken and hang down upon a street where the plaintiff's horse was being driven, and without fault of the driver the horse was brought in contact therewith, whereby injury ensued, is sufficient without further allegation that the defendant carelessly and negligently brought about or permitted the actual contact.
2. EVIDENCE AS TO CAUSE OF INJURY.—Where it appears that the driver of a horse, upon the horse suddenly falling, springs to the ground and observes for the first time a wire hanging close to the wheel of his wagon, emitting sparks and flashes of light, and subsequently while the horse was struggling to his feet he was seen to come in contact again with the wire, whereupon he again fell, it was held sufficient to show that the horse was injured by an electric shock received from contact with a broken wire.
3. PRESUMPTION OF NEGLIGENCE; DOCTRINE OF RES IPSA LOQUITUR.—In this case the only evidence adduced touching the negligence of the defendant in allowing and permitting its wire to become broken and remain suspended upon a public street was the simple fact that it was found so broken and suspended, and that the injury to the horse ensued. It was held that such evidence was sufficient to establish a *prima facie* case, and that it imposed upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part. The doctrine of *res ipsa loquitur* applied and the plaintiff was relieved from the burden of proving the non-existence of an adequate explanation or excuse.
4. OVERCOMING PRESUMPTION.—The question as to whether the presumption of negligence has been overcome by the defendant is one of fact for the jury.
5. REASONABLE TIME TO REPAIR DEFECT.—It is not error to refuse to charge the jury that the defendant was entitled to a reasonable time after the fall of the wire which caused the injury, to repair or remove it. Such an instruction is applicable only where the wire has fallen without the negligence of the defendant, or was caused by an act of God, or some force, that could not have been provided against by reasonable foresight or precaution.

Appeal by defendant from judgment for plaintiff. Decided February 24, 1902; reported 41 Ore. 39, 67 Pac. 928.

Chaperone v. Portland General Electric Co.

This action was begun in a justice's court, and taken to the Circuit Court on appeal. The defendant is, and was at the time of the accident complained of, engaged in maintaining and conducting upon College and other public streets in the city of Portland a system of poles, and wires extended thereon, for the transmission of electricity; and for cause of action it is alleged "that on the 1st day of December, 1899, at about the hour of 3 o'clock a. m. of said day, the plaintiff was, by and through his employe, engaged in driving his horse and bakery wagon upon said College street, . . . and that, without notice of or fault upon the part of plaintiff or his employe, the defendant corporation carelessly, unlawfully and negligently allowed one of its wires, charged heavily with electricity, to become broken and hang down upon said College street, and that plaintiff, nor his employe, did not know that said wire was broken, or was hanging down upon said street; and that while said wire of defendant, charged with electricity, was so hanging upon and close to said College street, the horse and wagon belonging to plaintiff was being driven upon and along said street, and, without fault on the part of plaintiff or his employe, said broken and hanging wire, heavily charged with electricity, came into contact with and struck the horse belonging to plaintiff, and threw said horse to the ground, seriously and permanently injuring said horse, and breaking the shaft of the bakery wagon, and tearing the harness upon the horse, to the damage of the plaintiff in the sum of \$150," etc., which is followed by allegations of special damages. The sufficiency of the complaint was challenged during the trial by objections to the introduction of evidence, a motion for nonsuit, and by a request for an instruction to find in favor of the defendant.

Frederick V. Holman, for appellant.

D. Solis Cohen, for respondent.

Opinion by WOLVERTON, J.:

We have recently held, after a careful review of the authorities, that it is sufficient, in a declaration upon negligence, to specify the particular act, the commission or omission of which caused the injury, conjoining with it a general averment that it was negligently and carelessly done or omitted, and that it is unnecessary to go further and particularize or point out the specific facts going to establish the negligence relied upon. *Cederson v. Navigation Co.*, 38 Or. 343, 62 Pac. 637, 63 Pac. 763. The proposition has been still more recently sanctioned in *Boyd v. Electric Co.* (Or.), 7 Am. Electl. Cas. 605, 66 Pac. 576. To the same purpose, see *Snyder v. Electrical Co.* (W. Va.), 7 Am. Electl. Cas. 473, 28 S.

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E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. This results from the significance of the term "negligence," as applied to an act conducing to injury. It so qualifies the act as to render it actionable, and the allegation is treated as a statement of an ultimate fact, rather than a mere conclusion of law. But it is insisted that there is no pertinent allegation that the damage ensued from the negligence of the defendant, or, in other words (employing the language of the counsel), "it is not alleged that the wire coming in contact with and striking the horse was in any way due to appellant's negligence." The act of which plaintiff complained consisted in carelessly and negligently allowing and permitting a wire heavily charged with electricity to become broken and hang down upon a street where plaintiff's horse was being driven, and, without fault of the driver, was brought in contact therewith, whereby injury ensued. Now, to fill the measure of the contention, it was incumbent upon the plaintiff to go further, and affirm that defendant carelessly and negligently brought about or permitted the actual contact. This is the logic of the position, but it is fallacious in requiring a redundancy of allegation. The essential act of negligence is the primary one of allowing and permitting a wire charged with a subtle and dangerous energy to become broken and hang down upon a public street, where persons lawfully traveling were liable to come in contact with it. In the absence of any contributory act of negligence on the part of plaintiff in bringing about the contract, this becomes the proximate cause, and the injury is indisputably consequential, so that it becomes a matter wholly of supererogation to charge negligence in allowing and permitting the contact, and therefore was not essential to good pleading or the statement of a good cause of action.

There is evidence in the record tending to show that John Nagle, an employe of the plaintiff, was engaged in driving the horse attached to a wagon used for the delivery of bread from a bakery, and that just after turning a corner and entering upon College street the horse suddenly fell. Not being aware of the cause, the driver sprang to the ground, when he observed for the first time a wire hanging close to the wheel of his wagon, emitting sparks and

flashes of light. At no time, however, did he see the wire come in contact with the horse. This occurred about 3 o'clock in the morning, while it was yet dark. The night had been stormy and cold, and the streets were wet. The driver went for assistance, leaving the horse where he fell, and it was three-quarters of an hour before he regained his feet. In the endeavor to liberate him, and while he was struggling to his feet, the wire was seen to come in contact with him, when he again fell, as described by one of the witnesses, "like he was shot." The witness further states that the wire was throwing off sparks, and at one time he approached so nearly to it as to receive a shock from the ground. The horse was trembling badly when liberated, and seemed to be in great agony. There was blood upon the ground, and he had a cut above his eye, and another on his foot. It was also shown that the wire parted and remained suspended for an hour prior to the accident. Plaintiff having rested, defendant moved for a nonsuit, but without avail, whereupon it produced evidence tending to show that the night was very stormy, the wind reaching a maximum velocity of 45 miles an hour, and an extreme velocity of 56 miles, which is not extraordinary; that the lines had been in use for seven years, but were of first-class material, and that the wire in question had parted about midway between poles standing 130 feet apart; that the insulation was not broken, except at the point of fracture; that it carried 1,000 volts, but where broken the voltage was much less, being estimated at from 300 to 500; that the wires and their fastenings, and the poles upon which they were carried, were regularly inspected as often as once every other day by a competent electrician; that the company was equipped with the standard and best approved ground detectors, or appliances for detecting or discovering breaks and the grounding of its wires, and that on stormy nights it applied the test every half hour; that upon this occasion the detector did not indicate the parting of the wire, and that the first notice touching its condition came through a member of the police force; that there were no indications as to how the wire came to break; that they sometimes broke of their own accord, but the cause of the present fracture was ascribed either to the crossing of the wires in a gale,

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or to the blowing of a limb from a tree, or something of the kind across them, causing the current to pass from one to another, thus severing one of them by burning it at the point of contact. Both parties having rested, defendant moved the court to direct a verdict in his behalf, but this was also refused; and error is assigned both as it respects the motion for a judgment of nonsuit and the one to direct the verdict.

In support of its motion for nonsuit, the defendant contends that the proof is insufficient, in two aspects, to submit the case to the jury: (1) It does not show that the horse was injured by electricity; and (2) it does not show any negligence attributable to the defendant company contributing to the injury. The latest declaration of this court touching the quantum of evidence sufficient to carry a case to the jury is found in *Perkins v. McCullough*, 36 Or. 146, 59 Pac. 182, wherein Mr. Justice Moore says:

"The rule is well settled in this State that if there be any evidence, however slight, fairly susceptible of an inference or presumption tending to establish a material allegation of the complaint, it is the duty of the court to deny the motion for a judgment of nonsuit, and submit the question involved to the jury for determination"—citing all the preceding cases.

From the evidence adduced, it is quite manifest that the jury might reasonably have inferred that the horse came in contact with the heavily charged wire, and that the injury complained of was caused by an electric shock. The manner of its falling, the proximity of the wire, the second shock, which was observed by witness to have been produced by contact with the wire, its result, and the effect produced upon the animal, are amply sufficient from which the jury might reasonably and legitimately have drawn the inference that there was contact with the wire in the first instance, and that the injury ensued from electricity.

The other question involves the doctrine or *res ipsa loquitur*,—the thing speaks for itself. The only evidence adduced touching the negligence of the defendant in allowing and permitting its wire to become broken and remain suspended upon a public street is of the simple fact that it was found so broken and suspended, and that the injury to the horse ensued; no attempt being made to

show the cause of the fracture, or to show any act of commission or omission, carelessly or negligently suffered on the part of the defendant, conducing thereto. Was this sufficient? The defendant was engaged in the transmission and utilization of a subtle and dangerous energy over and along a public street by means of machinery and appliances presumably under its exclusive management and control, because the erection and maintenance of the system by the defendant has been admitted by its pleadings. The dangerous character of the business imposed upon the defendant a very high degree of care in the maintenance of its apparatus and appliances in a secure and safe condition, and thus to guard against the danger of accident to those in the lawful use and enjoyment of the street. Under these conditions, when the plaintiff had shown the fracture and the unsafe condition in which the wire was found (being suspended upon a public street), and that injury actually ensued therefrom, he was relieved from the necessity of going further and showing such facts as would exclude all other hypothesis or possibility (as that it was not due to the carelessness or unlawful acts of any third person, or other cause), because the most natural and reasonable inference therefrom is that the wire would not have parted or been out of repair, and the accident would not have happened, but for the neglect of duty enjoined upon the defendant; thus taking the case out of the general rule of law that the mere proof of an accident raises no presumption of negligence. The defendant's primary responsibility, because of the high degree of care with which it was charged; the likelihood that the condition would not have existed, in the ordinary course, if due care had been observed; and its exclusive control and management of the system, so that the plaintiff had not adequate or equal facilities with the defendant for ascertaining or showing from whence the real and actual cause of the parting of the wires arose,—conjunctively operated to relieve the plaintiff from the necessity of showing more in the first instance. Such a showing made for him a *prima facie* case, and imposed upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part; and this it could do by show-

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ing due observance of that degree of care enjoined upon it, and, if it had succeeded in that respect, it should have been exonerated. This is within the doctrine of *res ipsa loquitur*,—the defendant being required to give such evidence as would exonerate it,—and the plaintiff was relieved from the burden of proving the nonexistence of an adequate explanation or excuse. *Boyd v. Electric Co.*, *supra*; *Keasbey*, *Electric Wires*, secs. 271-273; 2 *Jag. Torts*, 864; *Power Co. v. Ruddy*, 7 *Am. Electl. Cas.* 524, 62 *N. J. Law*, 505, 41 *Atl.* 712; *Railway Co. v. Nugent*, 86 *Md.* 349, 38 *Atl.* 779; *Ugla v. Railway Co.*, 4 *Am. Electl. Cas.* 389, 160 *Mass.* 351, 35 *N. E.* 1126, 39 *Am. St. Rep.* 481; *Larson v. Railway Co.*, 56 *Ill. App.* 263; *Snyder v. Electrical Co.* (*W. Va.*), 7 *Am. Electl. Cas.* 473, 28 *S. E.* 733, 39 *L. R. A.* 499, 64 *Am. St. Rep.* 922; *Clarke v. Railroad Co.*, 9 *App. Div.* 51, 41 *N. Y. Supp.* 78. The proof submitted by plaintiff was therefore sufficient, tested by the motion for nonsuit.

This brings us naturally to the question presented by the motion to direct a verdict. When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration had been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury. *Railway Co. v. Nugent*, *supra*.

As bearing upon the amount of damages recoverable, the plaintiff testified that he was a judge of horses; that he purchased the injured horse from private parties five or six years prior to the accident, at which time he was six or seven years old, and paid \$100 for him,—the price asked; that he had been in constant use every day, and was capable of performing the work, but was worth nothing for the service at the present time. Other testimony indicated more in detail the character of the injury and its effect upon the usefulness of the animal, and in connection therewith he was exhibited to the jury. There was an objection to the plaintiff's testifying touching the value of the horse, on the ground that he did not show himself to be an expert or especially qualified thereto. This was overruled, and properly so. The horse was purchased for the especial business in which the plaintiff was engaged, and used therein for a considerable length of time, and this was sufficient to qualify him to give his opinion as to value. *Mason v. Part-rick*, 100 Mich. 577, 59 N. W. 239. Plaintiff further testified that he hired other horses to take the place of the one injured, so as to continue in business; that such service amounted to 14 days for one horse; and that he was put to the expense of \$14 therefor. It was insisted that witness should not have been permitted to state the amount paid for hire of such horses; but the testimony was relevant and competent, as it had some tendency to establish value. Plaintiff also testified that he paid \$4 for repairs to the wagon (mending or replacing the broken shaft), and \$3.35 for repairing the harness, necessitated by having been cut from the horse while down, in order to release him. Referring to these latter items of damages, defendant's counsel asked the court to instruct the jury as follows:

"I charge you that the plaintiff has failed to prove the reasonable value of any expenses claimed to have been incurred by plaintiff, caused by the injuries alleged in the complaint to the plaintiff's wagon and harness, and therefore you cannot consider any such damages. The testimony of plaintiff that he paid certain sums of money was not followed by any proof as to their reasonable value, and he cannot recover therefor."

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This was refused, and error is assigned. It is probably true that testimony touching sums actually paid for expenses necessarily incurred in repairing damaged property and utensils should ordinarily be supplemented with competent evidence that they were reasonable for the services rendered. *Golder v. Lund*, 50 Neb. 867, 70 N. W. 379. But these small items of expense incurred are matters of such common knowledge that we are disposed to let them rest with the jury, who are fully competent and qualified from their own experience to determine as to their reasonableness.

Some instructions were asked and refused, of which defendant complains. One of them was intended to present the same question as the motion to direct a verdict, and hence needs no further notice. Another reads as follows:

"That the defendant was entitled to a reasonable time after the fall of the wire in which to repair it, or to remove it out of the way of persons using the street; and if you find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action."

The instruction is plainly applicable only to cases where the wire had fallen without the negligence of defendant, or was caused by an act of God, or some force that could not have been provided against by reasonable foresight or precaution, and without such modification would have been misleading. It was therefore properly refused. Other instructions requested were clearly covered by the general charge.

There being no error in the record, the judgment of the court below will be affirmed, and it is so ordered.

Injury caused by contact with live wire suspended in street; doctrine of *res ipsa loquitur*; defect caused by severe wind storm; contributory negligence.—The case of *Boyd v. Portland General Electric Co.*, 41 Ore. 336, 68 Pac. 810, is an action brought by a minor, through his father as guardian, predicated upon the same facts as in the case of *Boyd v. Portland Electric Co.*, reported in 7 Am. Electl. Cas. 661. The following is an extract from the opinion of the court, which may be considered as supplementing the opinion delivered in the case formerly reported:

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"The defendant's initial contention, and the one most strenuously insisted upon, is that the plaintiff should have been confined in his proofs to the allegations of negligence contained in his complaint, and upon which he relied for recovery as thereby indicated, but that instead the instruction of the court just quoted set the matter at large with the jury, and permitted them to find upon grounds not set up in the complaint; that the doctrine *res ipsa loquitur* affords no proof in support of specific or particular declarations of negligent acts, such as is relied upon here for recovery, namely, that the wire was weak, or that it was improperly strung, or that defendant neglected to repair it, and that it only has application in a case where negligence is alleged in the most general terms. It must be conceded at the outset that the plaintiff cannot recover for acts of negligence not counted upon in the complaint. The *allagata* and *probata* must correspond, and proofs cannot be permitted to extend to the establishment of any cause not counted upon, for if such were not the rule there would be many surprises during judicial investigations, followed by injustice and wrong. Furthermore, it is a recognized principle of law that he who alleges negligence must establish it, and that the mere proof that an accident has happened raises no presumption of negligence. *Res ipsa loquitur* is a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, when from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control, management or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property or appliance which is the immediate cause of the accident or injury, had exercised usual and proper care and precaution with reference to it. The most usual statement of the rule is that contained in an old case (*Scott v. Docks Co.*, 3 Hurl. & C. 596), namely: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care.' But 'in such case, however,' says the learned author of the American State Reports, in an admirable note to *Huey v. Gahlenbeck* (Pa.), 6 Am. St. Rep. 790, 792 (s. c., 15 Atl. 520), 'it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without the fault of the defendant. Such a case comes within the principle of *res ipsa loquitur*; the facts and circumstances speak for themselves, and, in the absence of explanation or disproof, give rise to the inference of negligence.' The rule does not relieve the plaintiff from adducing any evidence within his power. In *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167, a leading case upon the subject, it was held that, where the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of the accident by which he was injured does not raise

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a presumption of negligence which the defendant can be called upon to rebut. The maxim or rule is, therefore, born of necessity, and entails the burden upon the defendant of showing due care when the facts are within his exclusive knowledge, so that the plaintiff cannot reasonably be expected to know or prove them. There must be something, however, in the facts proven in each case, that speak of the negligence of the defendant; and the question to be propounded and solved in every such case is, do the proofs speak through inference and presumption of the negligent conduct of the defendant? These observations are supported by the uniform current of authority, and apply in all their significance to cases where the injury has been received from live wires suspended in public streets and thoroughfares, which are exclusively under the control and management of the defendant, whether natural persons or corporations. 1 Shear. & R. Neg. (5th ed.), secs. 59, 60; Keasbey, Electric Wires, secs. 231, 233; 2 Jag. Torts, 938; *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Seybolt v. Railroad Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Western Union Tel. Co. of Baltimore City v. State*, 6 Am. Electrl. Cas. 210, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Bahr v. Lombard*, *supra*; *Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553; *Power Co. v. Ruddy*, 7 Am. Electrl. Cas. 524, 62 N. J. Law, 505, 41 Atl. 712; *Thomas v. Telegraph Co.*, 100 Mass. 156; *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495, 26 L. R. A. 256, 44 Am. St. Rep. 362; *Haynes v. Gas Co.* (N. C.), 5 Am. Electrl. Cas. 264, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Railway Co. v. Cooper* (N. J. Err. & App.), 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Tuttle v. Railroad Co.*, 48 Iowa 236.

"Now, the plaintiff might have alleged generally, as was the case in *Chaperron v. Electric Co.* (Or.), 67 Pac. 928, lately decided, that the defendant carelessly and negligently allowed one of its wires, heavily charged with electricity, to become broken and hang down upon the street, and by showing that it was so broken, suspended and charged with electricity, and the attendant circumstances of the injury, so far as could be reasonably considered to be within his power, he could thereby have made it incumbent upon the defendant to disclose proper care, diligence and precaution in all substantial details of construction and maintenance of the wire in place, and thus purge itself of the presumption of negligence arising from the facts disclosed by the plaintiff. But if the plaintiff chooses to narrow and circumscribe his cause of action, and specify and particularize the cause of the parting of the wires, and its consequent suspension upon the street, he thereby limits the inquiry to the cause designated and none other is pertinent or can be entertained at the trial; but this does not destroy the utility or applicability of the maxim *res ipsa loquitur*, if the facts proven speak of the negligence charged. It might be much restricted and limited in its utility, but it will speak none the less within the scope of the allegations of the complaint. Two of these specifications, in effect, are that the company negligently provided a frail, weak and otherwise defective

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wire, and that it was improperly strung. Now, the fact that it broke or became severed was a physical fact, which would be presumptive of negligence in supplying a weak and defective wire, and it would also imply negligence in the proper stringing of the wire, and thus call upon the defendant to explain in these particulars, but as to none others outside of the scope of the pleadings. The fact that the pleadings are restrictive lessens the burden of the defendant, as it has notice of the particular matters of presumptive negligence, and as to this must explain, and thus rebut the inference. It follows that an instruction properly limited, touching and permitting the application of the doctrine of *res ipsa loquitur*, where the allegations are restrictive, does not set the matter at large, and permit the jury to find upon any ground of negligence they might surmise, and thus without proper notice of the cause relied upon for the recovery mulct the defendant in damages. This we believe to be the doctrine of the cases, several of which are analyzed in *Boyd v. Electric Co.*, now standing on petition for rehearing, and their applicability determined. It is unnecessary to comment upon them further here, except that we believe *Snyder v. Electrical Co.* (W. Va.), 7 Am. Electl. Cas. 473, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, is so much in point that we will take the liberty, at the expense of brevity, of stating it more at large. The allegation there was that defendant negligently suffered one of its wires to be so insufficiently secured that it came down and lay in the street. Here the pleader particularized, and the court confined the proof to the allegation; yet, notwithstanding, it held the doctrine of *res ipsa loquitur* applicable. The following language of Mr. Justice BRANNON, who announced the opinion of the court, explains the holding: 'It follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2—that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction in lieu of it the jury was told that the mere fact of the injury raised no presumption of negligence, unless the proof establishing the injury showed the circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negatived the rule that the falling of the wire and injury afforded a *prima facie* case of negligence, and was beneficial to the defendant.' In the case at bar the court carefully restricted the application of the rule and doctrine to the allegations of the complaint. The jury were told, in effect, at the very outset, that the plaintiff must recover upon the negligence alleged, and, later, that the undisputed evidence of the defendant raised the presumption that the wire was sufficient in size and quality; thereby practically withdrawing this specification of negligence from their consideration. But that as to the stringing of the wire it would be necessary for them to find that it was either strung in a negligent manner in the first instance, or, after having been properly strung, it was negligently allowed to get out of position, and that defendant knew of it, or with reasonable diligence should have known of it. Thus were the jury restricted in their consideration of the presumption arising from the facts proved touching the negligence relied

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upon under the pleadings, and the instructions were as favorable to the defendant as it could ask.

"Another contention is that the defendant's uncontradicted evidence clearly showed that it was not negligent in providing a suitable wire or in stringing it properly, and that the court should have directed a verdict accordingly. There are cases where the defendant's exoneration appears so palpably and unmistakably against the *prima facie* case of presumptive negligence as to warrant such a disposition of the cause. Of such are *Spaulding v. Railway Co.*, 33 Wis. 582; *Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.* (Wis.), 65 N. W. 176. But where the evidence of the plaintiff has affirmative significance in establishing negligence, and the negligence complained of is not left wholly to inference or presumption, the question becomes a matter for the jury, to be determined by the preponderance of evidence. *Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171, 53 N. W. 850; *Stacy v. Railway Co.*, 85 Wis. 225, 54 N. W. 779. The plaintiff produced evidence tending to show that the wire which parted was blown against another, and that the contact probably caused the weaker one to burn and the ends to hang down. This had an affirmative tendency to show the improper adjustment of the wire, and thus, under the authorities just noted, the question of negligence became a matter for the jury in connection with defendant's attempted exoneration. These observations, with those of Mr. Chief Justice Bean, in *Boyd v. Electric Co.*, are sufficient to dispose of the contention.

"The court instructed as to what constituted an act of God, and it is claimed it was without the issues made by the pleadings. It was not altogether irrelevant, however, under the testimony, and being, as we deem it, a correct exposition of the law, no error was assignable in respect to it.

"The following instruction was asked and refused, and error is assigned, to wit: 'Where the circumstances of an accident indicate that it might have been unavoidable, notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it, from which the injury followed as a natural sequence.' The instruction was effective, if at all, to eliminate by implication at least, the relevancy of the doctrine of *res ipsa loquitur*, previously applied by the court. It stands upon an inconsistent theory with that adopted by the court, and was properly refused.

"The question of contributory negligence was for the jury. The plaintiff was a lad of about eleven years, who was sent on an errand by his father, upon the public street, where he had a right to be, and which he had a right to assume was unobstructed. While on the way his cap blew off in a high wind, and, upon hastily replacing it, he ducked his head to keep the wind from his face, and, passing rapidly along, came in contact with the suspended wire. He had no previous knowledge of its presence, or no reason to believe it was there, except what inference may have been drawn from the fact that he saw a wire suspended at the further pole 150 feet distant the evening before. It was properly a matter for the jury to determine whether

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this was negligence in a boy of the age of the plaintiff, and the instructions given sufficiently apprised the jury of the duty of the plaintiff while in the exercise of his right to be upon the public streets.

"This disposes of all the questions presented, and, being favorable to the respondent, the judgment will be affirmed.

Doctrine of *res ipsa loquitur* as applied to live wires in streets.—

The rule is, as established by the weight of authority, that the falling into the street of a wire so heavily charged with electricity as to be a source of danger to persons lawfully in the street, is of itself presumptive proof of negligence of the company maintaining the wire; unless such proof is rebutted, a person injured thereby will be entitled to recover damages. *Chattanooga Electric Ry. Co. v. Mingle*, 7 Am. Electl. Cas. 594, 103 Tenn. 667, 56 S. W. 23; see, also, *O'Flaherty v. Nassau Elec. Ry. Co.*, 7 Am. Electl. Cas. 535, 35 N. Y. App. Div. 74, 54 N. Y. Supp. 96; *Newark Elec. L. & P. Co. v. Ruddy*, 7 Am. Electl. Cas. 524, 62 N. J. L. 505, 41 Atl. 712; *Gannon v. Laclede Gas Light Co.*, 7 Am. Electl. Cas. 508, 145 Mo. 502, 46 N. W. 968, 47 N. W. 907 (holding that where a fireman in the discharge of his duty stepped upon a fallen electric wire of the defendant, which had broken and was lying upon the public highway, and was thereby killed, a *prima facie* case of negligence on the part of the defendant was made out, and the burden rested upon the defendant to show want of notice or other valid excuse); *Snyder v. Wheeling Electrical Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 661, 28 S. E. 733 (holding that the doctrine of *res ipsa loquitur* is applicable where a wire, charged with a deadly current of electricity, falls from its proper place of elevation to the street, and there kills a man lawfully passing along and coming in contact with it); *Jones v. Union Ry. Co.*, 7 Am. Electl. Cas. 447, 18 N. Y. App. Div. 267, 46 N. Y. Supp. 321; *Devlin v. Beacon Light Co.*, 7 Am. Electl. Cas. 563, 192 Pa. St. 188, 43 Atl. 1062 (holding that an electric light company which, in making alterations in its line, allows an arc wire to lie upon the pavement in a much traveled part of a city, without guard or warning to passers-by, is *prima facie* negligent); *W. U. Tel. Co. v. State*, 6 Am. Electl. Cas. 210, 82 Md. 293, 33 Atl. 763; *Larson v. Central Ry Co.*, 56 Ill. App. 263; *Clark v. Nassau Elec. R. Co.*, 6 Am. Electl. Cas. 234, 9 N. Y. App. Div. 51, 41 N. Y. Supp. 78 (holding that where a horse stepped on the rail of an electric street railway and immediately fell to the ground in a dying condition, and the driver, touching the hames, received a severe shock, it is *prima facie* proof of defective insulation and so of negligence on the part of the railway company); *Suburban Elec. Co. v. Nugent*, 6 Am. Electl. Cas. 238, 58 N. J. L. 658, 34 Atl. 1069 (in which case the dead body of a policeman was found at the foot of an electric light pole upon which, at about the level of a man's head, was fastened a reel containing an uninsulated wire rope, heavily charged with electricity; the man had a fresh burn upon his hand and his blood was in the condition usual to persons who have died from an electric shock; it was held sufficient proof that his death was caused by a shock received by contact with the

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wire rope, and that the maintenance of such reel and wire in such location and condition was a gross neglect of the duty which the electric company owed the traveling public); *Denver Consol. Elec. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 449; *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 284, 114 N. C. 203, 19 S. E. 344 (holding that the fact that the wire charged with electricity was allowed to dangle so near a sidewalk that a person walking on the sidewalk came in contact with the wire and was killed, raises a presumption of negligence of the company maintaining the wire, and casts upon it the burden of absolving itself).

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Pennsylvania; Supreme Court.

1. **INJURY TO PERSON BY CONTACT WITH LIVE WIRE USED IN MUNICIPAL POLICE SERVICE; LIABILITY OF MUNICIPALITY.**—The plaintiff, a boy, on his way to school, was injured by coming in contact with a police call wire which had broken and fallen to the street. The wire itself was harmless, but in breaking it crossed the feed wire of an electric railway and became heavily charged with electricity. It was held that the city was not exempted from the rule as to the degree of care to be used in the operation of electric wires.
2. **KNOWLEDGE OF BREAK.**—It appeared that the police officials knew of the break in the wire prior to the accident. This knowledge imposed the duty of examination upon the city officials, and whether such duty was properly met under the circumstances was a question of fact for the jury.
3. **KNOWLEDGE OF FATHER AS TO BREAK.**—It appeared that the father of the plaintiff as he went to his work in the morning noticed the broken wire and avoided stepping on it, but did not return to his home to warn his son, whom he knew would come over the same street, to avoid the wire. It was held that the duty of the father to warn his son under the circumstances was not so clear as to justify the court in declaring it as a matter of law.

Appeal by defendant from judgment for plaintiff. Decided January 5, 1903; reported 204 Pa. St. 509, 54 Atl. 311.

Plaintiff was injured by coming in contact with a police call wire which had broken and fallen to the street. The call wire was of itself harmless, but after falling it became charged with a heavy current of electricity from a feed wire of an electric railway. It appeared that about 8 o'clock on the morning

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of the accident the father of the plaintiff on his way to work saw the wire and carefully avoided it. He did not return to his home, which was a short way off, to warn his son. The boy was injured in the afternoon on his return from school. There was evidence that the police officials knew of the break in the wire within an hour after it occurred. The court admitted, under objection and exception, an ordinance of the city and rules of the police department relating to the inspection and use of the city wires.

The court charged in part as follows:

"While the call wire was harmless in itself, yet by its proximate relations to highly or heavily charged wires about it, or in close proximity to it, it might by contact with such wires, become a source of great danger. Against such danger the city was bound to guard by a high degree of care. This is the rule of care, clearly stated, by the Supreme Court in *Fitzgerald v. Edison Electric Illuminating Company*, 200 Pa. 540; 50 All., 161; 86 Am. St. Rep., 732. Mr. Justice Mitchell, delivering the opinion, says: 'Wire charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to the ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however (in this case the city), which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them. The duty is not only to make the wire safe, but to keep it so by constant oversight and repair. The case, in this aspect, is analogous to an action against a municipal corporation for an injury from a defective highway. The plaintiff is not bound to show direct and express notice of the defect (to the city in this case), but may show that it has existed for such a period that it ought to have been known to the authorities (in this case the city of Pittsburg).'

"This raises a question for the jury, viz., as to whether the city, by the exercise of proper care, under all circumstances, ought to have known of this highly dangerous condition upon the pavement. If it ought to have known; if there was such a reasonable time, or, rather, if such a reasonable time elapsed, within which the city, by the exercise of proper care, under the circumstances, would have discovered, or ought to have discovered, its dangerous condition on the highway—then the city was guilty of want of care, and is responsible for the damages, at least to the little boy, and perhaps to the father; but that is further along.

"Not only was it the duty of the city to exercise a high degree of care in the situation, by ordinance (and entirely outside of the ordinance that same duty remained), but in the exercise of that care it had methods and means, and it was bound to secure the reasonable method and means by which the proper inspection could be made. It had inspectors, or it was within the power of the city to have inspectors, to make proper inspection at proper

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times, having due regard to the locality and situation. That is, if a dangerous condition might arise in a section of the town that was very slightly populated, where perhaps few passengers would go by during the day, a less degree of care, in a sense as to time perhaps, would be required there than in a populous center, where it might be that millmen or other persons in large numbers frequently passed (as in this case) a point of danger."

Defendant presented these points:

"(1) That under the pleadings and evidence in this case the verdict should be for the defendant. Answer. Refused. It is for the jury to say whether it is or not.

"Notice to a police or lineman employed by the city of Pittsburg that a telephone wire is down upon the street of the city of Pittsburg is not notice to the city. Answer. Refused, under the evidence and testimony in this case.

"Before the jury can find the defendant guilty of negligence, it must be satisfied by the weight of the evidence that its negligence was the proximate cause of the injury. Answer. Affirmed, and the proximate cause of the injury, as we instruct you, would be the failure of the city, after the lapse of a reasonable time, to remedy that which it was its duty to remedy in order to prevent injury to persons passing along the sidewalk."

Verdict and judgment for Vincent Herron for \$6,364, and for Hugh Herron for \$864.

W. A. Blakeley and Thomas D. Carnahan, for appellant.

Joseph Howley and W. A. Hudson, for appellee.

Opinion by MITCHELL, J.:

It is the duty of all parties using a highly dangerous agent to use care commensurate with the danger, in order to prevent injury to persons or property exposed to its influence. *Fitzgerald v. Edison Electric Illuminating Co.*, 8 Am. Electl. Cas. 584, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. Cities are not excepted from the rule, and the fact that the agent is used or supervised under the police power does not excuse negligence in such use. *Mooney v. Luzerne Borough*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811. The cases deciding that municipal corporations are not liable for errors of judgment or discretion rest on entirely different principles.

The wire in this case was a police call wire, and broke as early as 8 o'clock in the morning. The fact of the break was known to

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the police officials presumably at or near that time, and according to the evidence certainly as early as 9 o'clock. The wire was very lightly charged, and not in itself dangerous, but it was a naked wire, and strung on poles in close proximity to other wires, some of which carried strong and dangerous currents of electricity. The fact of the break, therefore, was notice that it might become dangerous, and imposed the duty of examination. Whether that duty was properly met under all the circumstances, the lapse of time, the condition and population of the neighborhood, the urgency of the possible danger, etc., was a question for the jury.

The evidence as to the ordinance, police regulations, etc., though not important, was not incompetent. It merely tended to make more clear and definite the responsibility for due care which existed outside of them.

The father saw the wire on the pavement as he went to work in the morning, and knew that his son would shortly pass the same place on his way to school. He testified that he avoided stepping on the wire, though he did not know whether it was dangerous or not. This was the act of a prudent man. Whether he ought further to have returned to his house, which was close at hand, to warn his son, was not so clear a duty that the court could declare it as a matter of law. It was a question of reasonable prudence or contributory negligence which was properly left to the jury.

Judgment affirmed.

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Texas; Court of Civil Appeals.

1. INJURY TO PERSON BY CONTACT WITH WIRE HANGING FROM POLE OF ELECTRIC LIGHT COMPANY; LIABILITY OF COMPANY.—The plaintiff was injured by contact with a wire hanging from one of the poles of the defendant in a public street. Such wire was connected by a similar wire with an electric wire at a point where the insulation on such wire was worn. A dangerous current of electricity was thus conveyed to the hanging wire. The dangerous condition had thus existed for a period of two weeks prior to the time of the accident. Such wire extended from the pole to a point not more than a foot or two above the sidewalk. The plaintiff was injured while passing along the sidewalk by coming in contact with the hanging wire. It was held negligence for the company to permit such wire to remain in such dangerous condition. The fact that the wire did not belong to the defendant or was not placed upon the pole by it does not relieve it of responsibility since it was hanging upon a pole which was maintained by the defendant.
2. PROXIMATE CAUSE OF INJURY.—It was not error for the court to refuse to charge that the injury to the plaintiff was not proximately caused by the negligence of the defendant. The defendant negligently permitted a charged wire to come in contact with the hanging wire at a point where the insulation on the charged wire had been worn away, thus permitting the conveyance of a dangerous current of electricity to the hanging wire, thereby endangering the lives of persons on the street. Each of these negligent acts concurred and caused the plaintiff's injuries, and the defendant is liable therefor.

Appeal by defendant from judgment for plaintiff. Decided December 11, 1901; reported 27 Tex. Civ. App. 520, 66 S. W. 221.

Millard Patterson and C. N. Buckler, for appellants.

Beall & Kemp, for appellee.

Opinion by NEILL, J.:

This appeal is from a judgment against appellants in favor of appellee for \$1,000, damages occasioned by the negligence of appellants in permitting a wire charged with electricity to hang down from the poles of an electric light company which they were operating near a public street. The conclusions of fact and law fully

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show the nature of the case. On or about the 1st day of July, 1900, appellants, Wehner & White, a partnership composed of Peter Wehner and Z. T. White, were in possession of and operating under a lease all the property of the El Paso Gas, Electric Light & Power Company, a corporation organized for the purpose of generating and selling electricity to the city of El Paso and its inhabitants, including its entire plant, posts, wires, appliances, etc., and under their lease from the company had exclusive control and management of the machinery, works, poles, wires, and appliances of said company. On that day, and long prior thereto, the appellants, as such lessees, maintained and operated along the streets of said city a large number of poles, electric wires, and lamps, for the purpose of furnishing electricity to the city and its inhabitants. One of the electric wires so maintained and operated by appellants, was suspended from poles along the north side of San Antonio street, one of the principal thoroughfares of said city, and charged with a strong and dangerous current of electricity. Below and near this wire was suspended from the same poles one that was uninsulated, the end of which was broken and hanging within a foot or two of and above the sidewalk on the north side of said street. The insulation of the upper wire, through which the strong electric current was conveyed, was worn and abraded. In contact with one of its abrasions was a small bare wire, which extended therefrom, and rested upon the uninsulated and broken wire beneath, thereby conveying to and charging it with a strong and dangerous current of electricity from the defectively insulated wire above; thus rendering the uninsulated hanging wire very dangerous to persons passing along said street and sidewalk. This dangerous condition of the wire existed on the day above stated, and had been maintained continuously for about two weeks prior to and up to that time, and, by the exercise of ordinary care, could and should have been known by the appellants. On the evening of the day stated the appellee, Dagmar Lagerfelt, a little 10-year-old girl, with a younger brother, while walking along said sidewalk, in ignorance of the danger, came in contact with the uninsulated hanging wire, charged with a strong and dangerous current of electricity

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in the manner and by the means aforesaid, and thereby received serious and painful wounds and burns, from which she suffered exceeding physical and mental pain and anguish, and from which she still suffers. It was negligence in appellants to maintain said wire charged with electricity so near a public street as to endanger persons in the exercise of their rightful use of it, and such negligence was the proximate cause of appellee's injuries.

CONCLUSIONS OF LAW.

1. The appellants offered to prove by A. L. Justice, a physician of 35 years' practice, that a shock to the human system from electricity, such as had been received by appellee, would leave no permanent injury or bad results, and that there would be no tissue change on account of such shock. The appellee's counsel objected to the introduction of such testimony, on the ground that it had not been shown that the witness was competent to testify as an expert as to such facts. The witness, being then interrogated by appellants' counsel, said that he had read the best authorities on the subject, and knew what the authorities said and claimed to be the result of electricity upon the human system. But at the same time he said he was not an expert, and, to be very frank, did not feel qualified to give an opinion; that he did not know what would be the probable result of a shock from electricity, such as is complained of in this case, from actual experience, because he had no experience in treating such cases, but, from reading the best authorities on the subject, he knew what they said about the matter; whereupon the court held that the witness had not shown himself to be sufficiently expert in the matter, and sustained the objection and refused to permit him to testify as to such matters. The definition of the word "expert" is: "An expert or experienced person; one instructed by experience; one who has skill, experience, or extensive knowledge in his calling or in any special branch of learning." *Webst. Int. Dict.* An "expert," as the word imports, is one having had experience. *Lawson, Exp. Ev.*, 2nd ed., 230,

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Rule 36, which follows the definition by the same author, is thus stated:

"Therefore, to render the opinion of a witness admissible on the ground that it is the opinion of an expert, the witness must have special skill in the subject concerning which his opinion is sought to be given."

Then, quoting from *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342, he says:

"Matter of opinion is entitled to no weight with a court or jury, unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill, or science in such matters as entitle their opinions to pass for scientific truth."

Of all others the witness was best qualified to know whether he was an expert on the subject concerning which his opinion was sought to be given. To his credit, learning, and candor, be it said, he knew himself well enough to know that he was not an expert, and did not feel qualified to give an opinion on the subject of inquiry. Frankly expressing to the court this knowledge and opinion of himself, it became apparent that, if he gave any opinion, it could not be such as would be "entitled to pass for a scientific truth." When a witness states he knows nothing about the subject of inquiry, and that he is not qualified to give an opinion, he should not be permitted to express any; for, in order to say something concerning a matter, the witness should know something. *Wheeler v. Blandin*, 22 N. H. 167, and *Id.*, 24 N. H. 168. In the case before us the witness had no experience, and did not consider himself either an expert or qualified to give an opinion. He only knew what the books said upon the subject. It was not sought to be shown that he had formed an opinion from the books, or, if he had, what such opinion was. While an expert may testify to an opinion of his own derived from books, for one to do so he must be an expert and have an opinion of his own upon the subject of inquiry. Books of science and art are not admissible in evidence to prove the opinions contained therein. *Lawson Exp. Ev.* 202. If they are not, how can one who knows their contents, but has formed no opinion of his own upon the subject under consideration, be

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allowed to testify to what the books say? The books themselves would be the best evidence, and they are no evidence at all. The witness testified to everything he knew about the effect of the electric shock upon the child, and the court did not err in refusing to permit appellants to prove anything more by him.

2. It is a matter of no consequence who was in fact the owner of the uninsulated broken wire which hung from appellants' poles over the street, and shocked and injured the appellee with its electric current. *Macon v. Railway Co.* (Ky.), 7 Am. Electl. Cas. 630, 62 S. W. 498. The negligence of appellants consisted in allowing the wire to remain in a condition dangerous to persons using the street. Therefore the court did not err in refusing to allow appellants to prove that the wire did not belong to them, but was owned by some one else, if the property of any one. It was on the poles maintained by them, and in position and condition to receive a dangerous current of electricity from a wire they did own, and injure persons passing along the street. This condition and position they knew, or by the exercise of ordinary care could have known, and have reasonably anticipated the danger to the public. The business of supplying the public with electricity, for lighting or other purposes, involves the handling of a highly dangerous agent, and therefore requires a corresponding degree of care on the part of one who undertakes it, to prevent injury to persons passing along streets where his wires are strung. And one who lets the use of a structure, *e. g.*, a telephone pole, for electric wires thereto, is liable for defects in the structure by which electricity is caused to escape from the lessee's wires, injuring third persons. *Telegraph Co. v. Thorn*, 5 Am. Electl. Cas. 283, 12 C. C. A. 104, 64 Fed. 287. In the case cited defendant's broken telegraph wire, which hung to the ground, came in contact with a third party's electric wire on the same pole, and a shock was communicated to plaintiff from the latter wire through defendant's wire, and the court held the defendant liable.

3. By special charge No. 1 appellants asked the court to charge the jury as follows: "There being no testimony in this case that the injury to the plaintiff was proximately caused by the negligence of

the defendants, you are therefore instructed to return a verdict for the defendants." The refusal of the court to give the instruction is assigned as error. In connection with this, we are asked to consider the sixth assignment, which complains of the court's refusal to give appellant's fifth special charge, which, though argumentative, is in effect the same as the first. We have stated in our preceding conclusions, which we think fully warranted by the evidence, the agencies and means by which appellee was injured. From the evidence upon which our conclusions are based, we cannot perceive how it can seriously be contended that appellant's negligence was not the proximate cause of the injuries sustained by the appellee. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which the event would not have occurred." *Shear. & R. Neg.*, 5th ed., sec. 26.

"Where there is negligence, and injury flowing from it, and there is also an intermediate cause, disconnected from the negligence, and the operation of this cause produces injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. . . . Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supercede the original culpable act, and be in themselves responsible for the injury, and it must be of such a character that they could not have foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury. The intermediate cause must supercede the original wrongful act or omission, and be sufficient of itself to stand as the cause of the plaintiff's injury, to relieve the original wrongdoer from liability. 'One of the most valuable of the criteria furnished us by the authorities is to ascertain whether any new force has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient as the cause of the misfortune, the other must be considered too remote.' The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the

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injury on that account." *Akers v. Telegraph Co.* (Or.), 7 Am. Electl Cas. 349, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 640.

The following quotation from the opinion on motion for rehearing shows the similarity of that case to the one under consideration:

"The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been, similarly suspended as to the street."

Here we have a case where the appellant negligently permitted an uninsulated wire to hang from their poles within a foot or two of a public street. They negligently permitted the wire above it, which was charged with electricity, to become abraded as to its insulation, and negligently suffered these two wires to become and remain connected by a smaller wire, which conveyed the dangerous current of electricity to the hanging wire, thereby endangering lives of persons on the street. Each of these negligent acts concurred and caused appellee's injuries. Had it not been for coming in contact with the hanging wire it would not have occurred. *Railway Co. v. Sweeney* (Tex. Civ. App.), 36 S. W. 800, and cases cited. The court did not err in refusing to give the requested special charges.

The charge of the court is a correct enunciation of the principles of law applicable to the evidence, and none of the assignments which complain of it is well taken. *Power Co. v. Maxwell*, 3 Tex. Ct. Rep. 328, 65 S. W. 78; *Perham v. Electric Co.* (Or.), 7 Am. Electl. Cas. 487, 53 Pac. 14, 40 L. R. A. 800, 72 Am. St. Rep. 730; *Electric Co. v. Simpson* (Colo.), 5 Am. Electl. Cas. 278, 41 Pac. 499, 31 L. R. A. 566, note, and immediately succeeding cases of same nature.

No error is assigned which requires a reversal of the judgment, and it is affirmed.

GLOUCESTER ELECTRIC CO. v. KANKAS.

United States Circuit Court of Appeals, First Circuit.

1. INJURY TO PERSON CAUSED BY CONTACT WITH LIVE WIRE; EVIDENCE OF CONDITION AFTER INJURY.

In an action for a personal injury caused by the plaintiff's hand coming in contact with one of the defendant's wires which was defectively insulated, evidence is admissible showing the height of the wire above the place where the plaintiff was walking, five or ten minutes after the accident, as bearing upon the question as to whether or not the wire was so situated as to unreasonably and carelessly expose the plaintiff to danger.

In error to Circuit Court of the United States for the District of Massachusetts. Decided January 22, 1903; reported 120 Fed. 490.

John Lowell and James A. Lowell, for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Opinion by ALDRICH, District Judge:

In this case the plaintiff was injured by coming in contact with an electric wire, which was used to conduct a current of sufficient voltage to be dangerous. The wire entered a building over a roof or platform to which there was a door opening, and through which people sometimes passed. The wire was four or five feet above the platform, but its exact height was in controversy. It is admitted that the insulation about the wire was badly defective, and that the wire had been suspended over this platform for something like twelve years. The question of the necessity of inspection, and the question whether the defendant was lacking in due care in not discovering the defective condition, were questions of fact for the jury, and we think there was sufficient evidence to entitle the plaintiff to go to the jury. So much as to the plaintiff's first assignment of error.

The remaining assignment relates to the admission of the statement of Preston O. Wass as to the situation of the wire five or ten

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minutes after the accident, who said it was within easy reach. The evidence of Wass did not relate to the condition of the wire,—in other words, to the question of improper insulatory covering which created the conditions that caused the injury,—but to the question of the situation or height of the wire; and that was material upon the question whether or not it was so situated as to unreasonably and carelessly expose the plaintiff to danger. Whether it was so situated that a woman's hand would fall upon it when dropped from her head, as the plaintiff testified, or within easy reach, as testified by Mr. Wass, is perhaps not very decisive on the question whether it was so situated as to unreasonably expose people to danger. However that may be, we think the evidence was competent.

The wire in question, as shown by the exhibit, was a one-eighth inch copper wire of firm consistency. It is a matter of common understanding that the strength of a wire of such size and consistency is sufficient to withstand the strain to which this wire was subjected without stretching. There is no evidence that the wire broke from its fastenings at the ends of the 90-foot stretch. Indeed, it is admitted that it did not. We think the trial court might have reasonably inferred, therefore, that the strain to which the wire was subjected would not have materially or substantially changed the situation, and that the evidence, therefore, might not only have been admitted, but considered by the jury. We make no question as to the general rule, which is well established, that, in order to make statements of the condition of the thing in question before or after the injury admissible as evidence, it must be shown to be in the same condition as it was at the time of the injury; and this rule plainly enough results from the fact that the situation or condition at the particular moment is the decisive question. The rule, however, is subject to many qualifications. Though the thing is slightly changed, evidence of its condition before and after, under certain restrictions, may be given as tending to show the condition at the exact time of the injury. It must not be remote, however, in respect to time, and the conditions must be substantially the same. In other words, if evidence is offered of the condition at

a time before or after the accident, the circumstances must be such as to show that its then condition would have some bearing upon the question as to what the condition was at the time of the accident. Of course, if there was a substantial or radical change, it would not be competent. If the change was immaterial, or slight in respect to displacement or the situation, it would still have some tendency to show its condition when it caused the injury. The presiding judge must necessarily pass upon the question of remoteness, and the question of fact whether the condition is the same, or substantially the same, as at the moment of the accident, or so near the condition as to have some tendency to show how it was then. The strain to which the wire was subjected may have made some slight change in the situation of the wire, but, under the circumstances described, not so substantial a change, in our opinion, as to render the evidence incompetent.

The only dispute in argument upon the exception in question was whether the wire was something like four or something like five feet high; and we think under the circumstances that the situation of the wire after the strain would be evidence for the jury, under proper explanations, upon the question of its condition at the time of the accident. Of course, to make evidence of a subsequent or prior condition admissible, the situation must be such as to justify the inference that the then condition was substantially the same as at the time of the accident. It is not an unusual thing in trials for the judge, acting upon an inference, at one stage of the trial to admit evidence, and at a subsequent stage of the trial, upon a situation which shows the inference to be not well founded, to withdraw the evidence from the jury, with instructions not to consider it. Another way of dealing with such evidence, not unfamiliar, where the question whether the conditions are substantially the same, involves a serious conflict upon the evidence, is to leave the evidence with the jury provisionally, under instructions that it is not evidence, and should not be considered unless the jury find the condition to be substantially the same as at the time of the injury.

In many cases it is impossible to show the exact condition at the exact time of the injury, as, for instance, where the person is killed. Under such circumstances, the question whether the condition at a subsequent time is the same is necessarily a matter of inference, and whether it is so nearly or so substantially the same as to have a tendency to show its condition at the time of the injury is also necessarily a matter of inference. A slight change or a slight displacement would not necessarily render the evidence incompetent, but the change would call for proper explanation by way of instructions to the jury.

The cases are numerous to the effect that if there has been no change, or if the change is slight or not of a substantial or material character, the evidence is admissible. In this view, it becomes largely a matter of discretion for the court to determine what evidence shall be admitted; and, as said in a note to 1 Greenl. Ev. sec. 14t, "it largely depends upon the thing, and the facts of each case must control, and precedents are of little value." In the case at bar the wire remained on its attachments. The thing was there in all substantial respects the same as before the pressure was put upon it; and the question, as has been said, would not be whether there had been any slight change, but whether the fair inference would be that the change had been so substantial as to render the evidence not of consequence upon the question of the condition at the precise moment of the injury.

In this case the presiding judge, acting upon the idea that there might have been some displacement, withdrew the evidence, and twice cautioned the jury distinctly and emphatically not to consider the evidence of the witness in question. With these views, we think the attitude of the Circuit Court sufficiently favorable to the plaintiff, and the exceptions are therefore overruled.

The judgment of the Circuit Court is affirmed, with costs for the defendant in error.

Other Cases Relating to Injuries Caused by Contact with Wires in Streets and Highways.

1. Death of mule coming in contact with live wire; contributory negligence of driver.—The case of *Jones v. Finch*, 128 Ala. 217, 29 So. 182, was an action to recover for the death of a mule occasioned by contact with a telephone wire suspended in the highway. The court said:

"This is an action prosecuted by Finch against Jones & Hooks, sounding in damages, for the alleged destruction of a mule belonging to plaintiff by the defendants. The gist of the action is that defendants negligently diverted an electric current from a trolley wire down into the street beneath it, and into plaintiff's mule, passing along the roadway, causing its death. The *quo modo* is sufficiently stated in the complaint. That the defendants negligently caused a telephone wire to fall and remain across the trolley wire, hanging down into the street, where it would come into contact with passing animals, charged with the deadly electric current from the trolley, and that this telephone wire so charged came in contact with the plaintiff's mule, and killed it, was proved beyond adverse inference by uncontroverted evidence. That the driver of the mule did not see the suspended wire until it came in contact with the animal, and felled it to the ground, is also shown by undisputed evidence. On this state of case, the negligence of the defendants was an efficient proximate cause of the result complained of, and it is of no consequence that the negligence of the owner of the trolley wire in not providing fenders against the telephone wire was a conjunctive cause of the disaster. And the driver having a right to assume that the way was free from such dangerous obstruction, and not becoming aware of its presence before the animal was stricken, is not chargeable with contributory negligence. The trial court, therefore, properly overruled the demurrer to the amended complaint, sustained the demurrer to the plea by which it was sought to set up contributory negligence, and gave the affirmative charge, with hypothesis, for the plaintiff. *McKay v. Telegraph Co.*, 6 Am. Electl. Cas. 223, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589; *Quail v. Telephone Co.*, 6 Am. Electl. Cas. 303, 34 N. Y. Supp. 470, *Crow. Electricity*, secs. 248, 249."

2. Degree of care to be exercised by a street railway company where a trolley line has broken and fallen in street.—In the case of *Neal v. Wilmington and N. C. Elec. Ry. Co.*, 3 Penn. (Del.) 467, 53 Atl. 338, it appeared that a guy wire supporting an electric trolley line had fallen and become charged with electricity. The plaintiff's intestate while walking along the highway came in contact with such wire and was killed. The defendant company had notice of the broken wire and permitted it to remain in the condition it was in at the time of the accident for several hours. It was held that the defendant was bound under such circumstances to exercise such care to prevent injury as a reasonably prudent man would exercise under such circumstances, considering the dangerous character of

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the wire, the existing conditions, and the surrounding circumstances; that a traveler on a highway is entitled to assume that it is reasonably safe, and, while required to use reasonable care and caution to avoid danger, is not required to search for obstructions and dangers therein; that where the proximate cause of the death of the plaintiff's intestate was the defendant's negligence in permitting a guy wire to fall into a street and become charged with electricity, it was immaterial that the negligence of some third person may have contributed to the accident.

3. Variance between declaration and proof.—The case of *Cumberland Telegraph & Telephone Co. v. Hunt*, 108 Tenn. 697, 69 S. W. 729, was an action for damages for personal injuries caused by coming in contact with the wires of the defendant on a city street. The error assigned was that there was a complete variance between the declaration and the proof as to the acts of negligence of the company which caused the injury. It was insisted that the declaration charged that the wires were down in the streets because of the defective and rotten condition of the poles, while by the proof it was shown that the wires were down because of a storm which had blown down the poles, detached the wires and thrown trees and abstractions across them. The court said:

"The gravamen of the charge in the declaration is the rotten and unsafe condition of the poles and fastenings, and nothing is said in either of the counts about a storm causing the falling of the wires. But there are in the declaration—especially in the third and fourth counts—very specific charges that the company allowed its wires to remain down in the streets in a dangerous condition for an unreasonable length of time, and with knowledge of this danger. There is some evidence of defective and unsafe poles along the streets and near the place of this injury, and, if the declaration should be strictly confined to damage resulting from the use of defective and unsafe poles as the reason for the falling of the wires, there is evidence enough in the record, under the rule, to support the verdict and judgment. But we are of opinion that the declaration (especially in the third and fourth counts) sets out two causes of action, or two features of negligence—one the use of defective poles, and the other the allowing wires to remain down in the streets an unreasonable length of time—and the two grounds of negligence may be considered as separately alleged. That is, the allegation charging that the wires were down an unreasonable length of time can, under the wording of the declaration, be considered as the act of negligence for which damages are sought, irrespective of the reasons which caused the wires to be down; and upon this feature of the case there is ample evidence to sustain the finding of the jury and judgment of the court. We are of opinion therefore that there is not a fatal variance between the declaration and proof, and there is ample evidence to sustain the verdict and judgment, and it is affirmed, with costs."

DEFECTIVE INSULATION AND APPLIANCES.

LEXINGTON RY. CO. v. FAIN'S ADMR.

Kentucky; Court of Appeals.

1. **INJURY TO PERSON BY CONTACT WITH PULLEY WIRE USED IN HOISTING ARC LAMPS.**—The plaintiff's intestate was killed by an electric shock received from contact with a pulley wire used in lowering and hoisting an arc lamp. The pulley wire was not insulated and, coming in contact with the feed wire of the electric lamp, had become dangerously charged with electricity. The pulley wire at the point where it was attached to the reel was within four and one-half feet of the ground, and, therefore, convenient to the touch of a man or boy. It was held sufficient to establish negligence upon the part of the defendant.
2. **DUTY TO PREVENT ACCIDENTS.**—Those who manufacture or use electricity for private advantage must do so at their peril; the only way to prevent accidents where a deadly current is used is to have perfect protection at those points where people are likely to come in contact with it.
3. **CONTRIBUTORY NEGLIGENCE.**—Where a boy inadvertently or purposely touches a deadly electric wire within easy reach, without knowledge of the danger, he is not guilty of contributory negligence; as to whether or not under the facts in this case the plaintiff was guilty of negligence is for the jury to decide.

Appeal by defendant from judgment for plaintiff. Decided January 28, 1903; reported 24 Ky. L. Rep. 1334, 71 S. W. 628.

R. C. Stoll, Morton & Darnell, and Breckinridge & Shelby, for appellant.

Allen & Duncan, for appellee.

Opinion by SETTLE, J.:

One Eastin Fain, a boy 14 years of age, was killed in the city of Lexington, December 18, 1899, by an electric shock received from one of the wires of appellant. His father, the appellee, A. J. Fain, having qualified as administrator of his estate, brought suit against appellant in the Fayette Circuit Court, and upon the trial recovered a verdict and judgment for \$4,500. A new trial was refused

by the lower court, and appellant asks a reversal of that judgment by this court.

It appears from the record that appellant, at the date mentioned, was operating an electric light plant in Lexington, and furnishing electric light to the city by means of arc lamps located at various places therein. One of the arc lamps was suspended over the center of the intersection of Chestnut and Sixth streets, and was attached to a wire rope strung between two poles; one erected on the southwest corner of Sixth and Chestnut streets, and the other on the corner diagonally opposite. To this wire, called the "span wire," was fastened a pulley wire, which ran from the top of the arc lamp, then passed through a pulley fastened to the suspension wire at the center of the street, thence to a pole situated on the southwest corner of Chestnut and Sixth streets, there through another pulley at the side of the pole, thence down the street side of the pole to a reel, which was located on the side of the pole about four feet six inches from the ground. To this reel the pulley wire was attached, and by means of the reel the pulley wire was wound and unwound, and the arc lamp raised and lowered. The pole to which the reel and pulley wire were thus attached was in the pavement or sidewalk, about 30 inches inside of the curb intersection of the sidewalk of the streets. The main wire connected with the power house, and over which the electric current is conveyed, runs along the east side of Chestnut street. Two wires make connection with the main wire at the pole located on the northeast corner of Sixth and Chestnut streets, and these two wires, passing diagonally across Chestnut street in manner as the span wire, were attached to the pole on the southwest corner of said streets, and thence taken back and connected with the lamp. These wires, called "feed wires," conduct the electric current through the lamp, and produce illumination at the carbon points. The span and pulley wires are between the feed wires, and a few inches apart from the feed wires at a point where attached to the pole, and even closer at other points. It is alleged in the petition, and, we think, conclusively established by the evidence, that on the date named, and for some time prior thereto, the appellant negligently permitted the pulley wire men-

tioned to be and remain without any or proper insulation, and to become at frequent intervals, if not continuously, heavily and dangerously charged with electricity. While passing along Chestnut street about 7 o'clock in the evening, and evidently without knowing that the pulley wire was charged, or likely to become charged, with electricity, appellee's intestate touched or took hold of it with his hand, whereby he received the charge of electricity which caused his death. The intestate was in company with his brother, Elmore, at the time of the catastrophe, who was a year or more his junior in point of age. The brothers were on their way to a temperance lodge not far from their home. In his testimony given on the trial, Elmore said, in reference to what happened to his brother: "We got to Chestnut street, and the light wasn't burning, and my brother said it was mighty dark along here. That light wasn't burning. We went on down the street. I went on the right side and he went on the left side (of the pole), and as he got to the pole he caught hold of the wire, and, as soon as he touched it, it got to dangling and throwing him around, and directly threw him out in the street about six or eight feet." The question was then asked the witness, "Did he shake the wire himself?" to which he replied, "No, sir." The contention of appellant's counsel seems to be that Easton Fain deliberately pulled and jerked the pulley wire, and that his death was caused by the pulley wire being thus forced into contact with one of the feed wires at a point where the insulation was defective. In support of this contention the testimony of Robert Clardy is cited, who testified to having seen two or three flashes at the lamp, appearing before the flame came out on the wire between the lamp and the pulley. Clardy's wife and the negro Reuben Edwards testified in some sort to the same effect, but the reliability of this testimony is by no means conclusive. On the other hand, Elmore Fain, who is an intelligent boy, and the only eye-witness in position to know and speak as to the conduct of Easton Fain, testifies that the instant his brother took hold of the wire his body began to dangle, and was jerked from side to side of the pole, and finally cast into the street. No other witness claims to have seen Easton Fain at

the time, except the negro Edwards, and according to his admission upon cross-examination the pole was between him and the boy. So what he says, and what was said by Clardy and wife, in regard to the disturbance of the wires and flashes at the lamp, is explained by what was said by Elmore Fain, and is consistent with the theory that Eastin Fain was being jerked by the wire, rather than that he was jerking it. In the light of the evidence there were but two ways by which the current could be communicated to the pulley wire,—either by coming in contact with one of the feed wires, or by receiving it directly from the lamp. The insulation of the feed wire, according to the evidence, was manifestly imperfect. The night was dark, the weather wet and blustering. The jury doubtless believed, and were warranted by the evidence in finding, that the pulley wire met the pole within a few inches of the feed wire; that such nearness was a faulty and dangerous construction; that the insulation of the feed wire was imperfect and defective; and that these wires contained so much slack that in stormy or windy weather they were blown against the pulley wire, thereby permitting the escape of the electricity when the wire came in contact with anything furnishing a ground connection, which connection was provided when Eastin Fain took hold of the pulley wire. It is not unusual for persons of mature age and judgment, when standing near a tree or post, to lean against it; nor is it unnatural for a boy to touch any object that he may pass in walking along a street or sidewalk. The pulley wire, when it was attached to the reel, was within 4 1-2 feet of the ground, and therefore convenient to the touch of man or boy; and, there being nothing in its appearance to excite alarm or suspicion, it is hardly probable that a boy would know its dangerous character or appreciate the necessity of avoiding contact with it in passing. We think it a self-evident proposition that it was the duty of appellant, in using the streets of the city of Lexington, by permission of the municipal authorities, for purposes of private gain, to so conduct its business as not to injure persons passing along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occu-

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pancy. The law applicable to this case has been well settled in Kentucky in the several cases that have been brought to this court for final adjudication. It is, that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents where a deadly current is used is to have perfect protection at those points where people are likely to come in contact with it. *McLoughlin v. Light Co.*, 6 Am. Electl. Cas. 255, 37 S. W. 851, 34 L. R. A. 812; *Schweitzer's Adm'r v. Electric Co.*, 7 Am. Electl. Cas. 571, 52 S. W. 830; *Thomas' Adm's v. Gas Co.*, 7 Am. Electl. Cas. 588, 66 S. W. 398; *Macon v. Railway Co.*, 7 Am. Electl. Cas. 630, 62 S. W. 496.

It is not deemed necessary to discuss in detail the instructions given in this case by the lower court. In so far as they attempt to set forth the degree of care required of appellant, they were more favorable to it than the law and evidence authorized, for they, in substance, told the jury that appellant was only required to use such means as would prevent the escape of the current; instead of which they should have been instructed that it was appellant's duty to know the condition of the wire, and to use the utmost care to keep it safely protected by proper insulation in order that those exposed to likelihood of contact with it might escape injury. The instruction as to contributory negligence complained of by appellant was certainly as favorable to it as the law allowed, as by it the jury were told that:

"If said Fain purposely took hold of said pulley wire, and by so doing caused it, or any wire, to come in contact with another wire charged with an electric current, this was negligence on the part of said Fain."

The Supreme Court of North Carolina, in *Haynes v. Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, which was an action to recover damages for the death of a 10-year-old boy by coming in contact with a live electric wire on the ground, said:

"A child is held to such care and prudence as is usual among children of his age and capacity. The defendant contends that the deceased was ten years of age; a very healthy, intelligent, moral and industrious boy. Let us assume this to be true. As he returned to his home the morning of his death,

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passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk, not by mere permission or invitation, but because he, as one of the public, had an absolute right so to do. The wire was on the sidewalk. Only one witness saw him when 'he took hold of the wire, and the wire threw him in the ditch.' That witness testified that 'He did not have to reach for it. He just reached out his hand and took it. He did not have to stoop.' No witness testified that there was anything from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or, indeed, any current at all. . . . We should be very loath to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surround the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that 'upon the evidence the plaintiff's intestate was not guilty of contributory negligence' should have been given."

It is rare, indeed, that two cases can be found the facts of which are so nearly alike as in the case before us and the North Carolina case, *supra*. The boy Fain was, when killed, traveling on the sidewalk, where he had a right to be. The deadly wire was in easy reach. He, boylike, inadvertently or purposely touched or took hold of it, without knowing of the danger of so doing, as there was nothing in its appearance to give him warning of the presence of the mysterious and deadly current with which it was charged. Under such circumstances it may be doubted whether there was any proof of contributory negligence to go to the jury; but the question of whether he was guilty of negligence in thus taking hold of the wire was properly submitted to the jury by the instructions of the lower court, and we think the conclusion of the jury that he was not guilty of such negligence is fully sustained by the evidence. We do not approve of some of the phraseology of the instruction as to compensatory damages given by the lower court, but, as the verdict allows only reasonable compensation to the decedent's estate for the loss of his life, and it is manifestly evident that the jury were uninfluenced by passion or prejudice in fixing the amount thereof, we are convinced that appellant was not prejudiced, nor its substantial rights injured by the giving of the instruction.

Being of the further opinion that the lower court did not err to the appellant's prejudice in the giving or refusing of instructions

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nor in refusing it a new trial, the judgment is affirmed, with damages.

Perfect insulation at places of probable contact.—It is the duty of a company maintaining and using in its wires a deadly current of electricity to furnish perfect protection at those points where people are liable to come in contact with the wires. *Overall v. Louisville Elec. L. Co.*, 7 Am. Electl. Cas. 521, 21 Ky. L. Rep. 886, 54 A. S. 1102. In this case the court said: "Electricity is the most powerful and dangerous element known to science. It cannot be seen, and it is as silent as it is deadly, and it follows that those who manufacture and use it for private advantage must do so at their peril. The only way to prevent accidents where a deadly current is used is to have perfect protection at those points where people are liable to come in contact with it. To instruct the jury that 'it was the duty of the defendant to observe the highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who might come into contact with them' was not sufficient. The law requires at those points where such contact is likely to take place, perfect protection from this unseen and terrible power." See also *Schweitzer's Admr. v. Electric Co.*, 7 Am. Electl. Cas. 571, 21 Ky. L. Rep. 608, 52 S. W. 830.

The rule, as stated by Mr. Joyce (Joyce on Electric Law, § 445) is as follows: "A company maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business or pleasure, to prevent injury. It is the duty of the company under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places."

Latent defects in insulation.—It frequently happens that from the appearance of an electric wire a man of ordinary intelligence cannot distinguish whether the wire is dead or live, or whether it has been properly insulated. If the defects in the insulation are latent and not discernable, a person who comes in contact with such wire is not guilty of contributory negligence. *Clements v. Louisiana Elec. L. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 So. 51. One who touches an electric wire where the insulating material is worn off cannot be adjudged guilty of negligence as a matter of law where it appears that he did not know that the wire was charged, nor think it was an electric wire. *Griffin v. United Elec. Co.*, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477. And one who has no knowledge of the fact that an electric wire being wet destroys the insulation for the time, is not guilty of contributory negligence in grasping such wire with his hand when he comes in contact with it. *Giraudi v. Electric Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114.

Lutolf v. United Electric Light Co.

LUTOLF V. UNITED ELECTRIC LIGHT CO.

Massachusetts; Supreme Judicial Court.

1. **DEATH OF PEDESTRIAN CAUSED BY ELECTRIC SHOCK WHILE STANDING NEAR ELECTRIC LIGHT POLE.**—The plaintiff's husband was killed while upon the sidewalk of a public street by means of an electric shock received when he was near an electric light pole which supported a lighted street lamp, and at a time when the current which fed the lamp was causing abnormal manifestations upon the pole and the apparatus attached to it. It appeared that the defendant employed men who twice each night drove past each street lamp, and while so passing looked to see whether the lamp was burning properly, and if so, passed on without stopping, and that one of these men had so driven past the place of the accident on the previous night and had then observed nothing unusual or out of the regular order. The negligence on the part of the company was held to turn upon the question whether the system of inspection was all that due care required of it under the circumstances; and that under the existing conditions the care which such a company should exercise in the oversight of its apparatus for the purpose of promptly discovering defects is within the proper province of the jury.
2. **GROSS NEGLIGENCE OF EMPLOYEES OF ELECTRIC LIGHT COMPANY.**—When the servant of the defendant company, in charge of its power house, was informed that the electric light pole was on fire and that one of the wires was down at that place, and he did not at the time of receiving such information turn off the current as he had the means and authority to do; and when an inspector directed in response to such information to visit and inspect the electric light pole and the lamp, did not arrive at the place within a reasonable time thereafter, the jury could properly find that there was gross negligence on the part of the defendant's servants.

Exceptions brought by defendant from judgment for plaintiff.
Decided June 19, 1903; reported 67 N. E. 1025.

The court refused the following requests for rulings on behalf of the defendant: (4) There is no sufficient evidence that the plaintiff's intestate was exercising due diligence at the time of his death. (5) There is no evidence that it was any part of the duty of plaintiff's intestate or that he was under any obligation to examine into the condition of the pole, but, on the contrary, he voluntarily exposed himself to danger, of which he had been amply warned and which he had full opportunity to avoid, and the plaintiff cannot recover. (6) Upon all the evidence in the case, the plaintiff's intestate having been warned to keep away from the pole, and having persisted in

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approaching and examining it, such act on his part was negligent whether he knew the precise nature of the danger or not, and contributed to the injury, and the plaintiff cannot recover.

J. B. Carroll and W. H. McClintock, for plaintiff.

W. S. Robinson, for defendant.

Opinion by BARKER, J.:

The action is a statutory one for causing the death of the plaintiff's husband. The briefs of both parties assume that he was killed while upon the sidewalk of a public street, and by means of an electric shock received when he was near an electric light pole which supported a lighted street lamp, and at a time when the current which fed the lamp was causing abnormal manifestations upon the pole and the apparatus attached to it.

The exceptions taken at the jury trial are to the refusal to give seven requests, and to "the instructions given not in harmony with said requests." The bill sets out over sixteen pages of the charge, and has no statement of any specific objection to any instruction contained in it. The first request was that upon all the evidence the plaintiff was not entitled to recover. The second, third and seventh were addressed to the question of the defendant's negligence, or that of the gross negligence of its servants. The fourth, fifth and sixth related to the question of the due care or negligence of the person killed. After the verdict the defendant filed a motion for a new trial because the verdict was against the evidence and the weight of the evidence and because the damages were excessive. After the filing of the motion, the judge who presided at the trial died, and, the motion having been heard and overruled by another judge, the defendant excepted to the disallowance of the motion by that judge.

No argument outside of those addressed to the exceptions to the refusal to give the other requests has been made in support of the exception to the refusal to give the first request, and we overrule that exception, for the reasons to be stated in connection with our decision as to the exceptions to the other requests.

Upon the question of negligence upon the part of the defendant corporation itself, as distinguished from that of its servants or employees, the evidence tended to show that the pole and its appliances had been installed for three years or more, and were part of one circuit of street lamps in a system of such circuits by means of which the defendant lighted the streets of Springfield. That these street lamps were fed by electricity, distributed sometimes from the defendant's power house in the city, and sometimes from a mill at Indian Orchard. That, when the lamps were giving light, the parts of the system in the streets carried a dangerous electric current. That defects in insulation of wires, or defects in the poles or other parts of the apparatus in the streets, might make the defendant's structures in the streets dangerous to persons who might be there. That the defendant employed men who twice every night drove past each street lamp, and, while so passing, looked to see whether the lamp was burning properly, and, if so, passed on without stopping, and that one of these men had so driven past the place of the accident on the previous night, and had then observed nothing unusual or out of the regular order. That the defendant also employed another set of men, called "trimmers," who went to each lamp once in nine days, lowered the lamp, cleaned the globes and renewed the carbons, and replaced the lamps; and that it was the duty of these men at the same time to look things over and see that there was nothing out of the way with the lamp or its apparatus or connections; and that the trimmer of the circuit in which was this lamp had visited it and trimmed it on the eighth day before the accident, and that he had then made the examination which it was his duty to make, and then there was nothing out of the way, so far as he could observe. That when the current was turned on to this circuit on the evening of the accident the lamp began to act abnormally, and that from that time until the current was turned off at the Indian Orchard power house at 9.15 p. m. the lamp continued to act abnormally, and that parts of the apparatus were burned, and there were manifestations of the presence of electricity at the pole

and at different parts of the connections between the pole and the lamp.

Whether the jury should have been instructed that there was no evidence of negligence on the part of the corporation itself turns upon the question whether the system of inspection was all that due care required of it under the circumstances. Under it no one had a duty of making a thorough examination, even by the eye, of the lamp and its connections, oftener than once in nine days, and all such examinations were made in connection with the manual work of cleaning globes and renewing carbons. The visits twice each night of the inspectors who drove past showed simply that the lamp was in working order at that time, and had no tendency toward ascertaining the presence of circumstances which might then be present and which at any moment might make the apparatus dangerous. Electric wires exposed in the open air to the action of the elements, and all the apparatus of the pole and lamp as they grow older, have an increasing tendency to become defective, while the destructive agency which they carry remains active. Under such a condition of things, the care which a corporation having a lighting plant extended throughout a city should exercise in the oversight of its apparatus, with a view promptly to discover defects giving rise to the greatest danger, is one which is peculiarly proper for the determination of a jury of the vicinage. In our opinion it was proper in this instance to submit it to the jury, and certainly, in our view, it would have been wrong to rule, as matter of law, that there was no evidence of negligence in this respect on the part of the defendant itself.

The seventh request was that, under the pleadings, no liability could be attributed to the defendant by reason of any alleged defective or improper method of inspection. We think the allegation that the defendant negligently and carelessly suffered and permitted its wires to be out of repair was enough to raise the question of a proper method of inspection.

Upon the circumstances bearing upon the question of gross negligence of the defendant's servants, there was much conflicting

testimony, especially as to the time when different things occurred. On the part of the defendant there was testimony that the current was turned on to the circuit at 7.51 p. m. On the part of the plaintiff there was testimony that it was turned on before dark, which would have been still earlier. Evidence on the part of the defendant tended to show that the deceased received the shock very soon after 8 p. m., and on the part of the plaintiff that the shock was received after half-past 8, and but little before 9 o'clock. Before the fatality, word was sent to a fire engine station, telephone messages were sent to the defendant's city power station, and a fireman visited the scene and tried to put out the fire on the post with an extinguisher. The deceased was not in the street until shortly before he was hurt, and the time of his appearance, and of the other circumstances mentioned, and of other occurrences, more or less material, were given differently by different witnesses. It would have been competent for the jury to find from the evidence that before 8 o'clock a servant of the defendant at its city power house, who had the means and the authority to cause the current to be instantly shut off from the circuit in which was the lamp, had received two separate telephonic messages, one informing him that the pole was on fire and the second one that a wire was down there. They could also find that if, in response to the information so received, this servant had then caused the current to be shut off from the circuit, no accident would have happened, and that he could have caused the current to be shut off simply by telephoning to the man in charge at the Indian Orchard power house, and that all that he did toward putting an end to the dangerous condition of things was to order an inspector to go to the place. The testimony also tended to show that it ordinarily would take from five to eight minutes to go from the place where the inspector was when sent to the place of the accident, and would have justified a finding that half an hour or more elapsed between the time when the inspector was sent out and the time when the deceased received the fatal shock, and that the inspector did not arrive upon the spot until after the deceased had been injured. In our opinion the jury properly could find that

there was gross negligence on the part of the servant of the defendant at the power house in not ordering the current to be turned off when he received the telephonic messages, and on the part of the inspector in not arriving at the scene of the accident in a reasonable time after receiving the order to go thither.

The other requests which were refused relate to the question of due care on the part of the plaintiff's intestate. While the evidence as to his conduct immediately before he received the fatal shock was conflicting, there was evidence which would have justified a finding that he had occasion to pass over the sidewalk which passed next to the electric light pole, and that while upon the sidewalk for that purpose, and near the pole, and without touching or attempting to touch it, he received the fatal shock. We think that, in view of this evidence, neither of the three rulings requested upon this branch of the case properly could have been given. The rulings given upon this branch of the case seem to us to have been sufficiently favorable to the defendant.

The remaining exception is to the disallowance of the motion for a new trial. So far as appears, the defendant voluntarily proceeded, after the death of the judge who presided at the trial, to have the motion heard by another judge. For this reason the defendant cannot be heard to say that the judge who heard the motion could not deny it.

Exceptions overruled.

South Omaha Waterworks Co. v. Vocasek.

SOUTH OMAHA WATERWORKS CO. v. VOCASEK.

Nebraska; Supreme Court.

1. INJURY CAUSED BY LIVE GUY WIRE; CONTRIBUTORY NEGLIGENCE.

Evidence that deceased, a lad of 17 years, knew that a guy wire of an electric light post carried an electric current, and that he voluntarily laid his hands upon it after being told by a younger companion to watch out, and get away, does not conclusively establish contributory negligence where it also appears that the current had been running over this guy wire for several days, with notice to defendant, and that the wire had been handled, pulled and shaken frequently by various parties during that time, and, a few minutes previously to the fatal occurrence, by deceased, and by others in his presence, without harm.

2. VOLUNTARY CONTACT.

Instructions to the effect that if such a lad, knowing such a guy wire was carrying an electric current, voluntarily took the wire in his hands, his doing so was such negligence as precluded any recovery for his death from the act, *held* properly refused.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. Decided October 16, 1901; reported 62 Neb. 710, 87 N. W. 536.

Woolworth & McHugh, for plaintiff in error.

John C. Cowin, for defendant in error.

Opinion by HASTINGS, C.:

Action for causing the death of Robert Vocasek through an electric shock from a guy wire attached to a post in plaintiff in error's electric lighting plant. Verdict for plaintiff below. Defendant brings error by 18 assignments, only 3 of which are relied upon in the briefs and argument: (1) That the evidence conclusively shows such negligence on the part of plaintiff's intestate as to entirely preclude any recovery on account of his death; (2) that the trial court did not properly submit to the jury the issues as to such contributory negligence, particularly in refusing defendant's instructions No. 3 and No. 5; and (3) error in permitting testimony as

to the existence of a wife and other children of the deceased's father, the plaintiff. The errors will be discussed in their order.

As to the first, it seems clearly established that the deceased knew, before the fatal contact, that the guy wire carried an electric current. It appears also that it had for some days become quite the regular thing for the boys of the vicinity to gather about the post and guy rope and experiment with the current, and defendant's evidence indicates that on the night of the injury 25 or 30 or more persons, variously denominated "kids" and "boys," had gathered around the place. It seems that pretty shortly after the lamps were lighted on July 3, 1896, the deceased, with one Strangland, came to the place, and there found one Dwyer; deceased being 17, the others 15, years of age. Strangland touched the guy wire with a nail stuck through a piece of weed a few inches long, and received quite a shock, which he supposes deceased must have known of. Deceased grasped and pulled on or shook the wire twice, dropping it quickly (as his companions suppose, because of the shock received). Both of deceased's companions had touched the wire on previous occasions, and received some shock. It appears from the testimony of both these lads that other boys were touching the wire that night. It appears also from the testimony of a police officer, Philip Connell, that other boys were catching hold of the guy wire, and pulling it, causing sparks at the point where it rubbed against the electric light wire. It appears that on the second time that deceased seized the wire one, at least, of his younger companions suggested that he "watch out," to which he replied by asking if doctors did not give electricity to people, and Dwyer replied, "Yes, a certain amount." After something more than half an hour of this, the two companions tried to coax deceased to "go up town." Strangland, at least, seems to have used some playful force, but, after going some 90 or 100 feet, he broke from them, and turned back. About 9 o'clock the policeman, Connell, testifies that, crossing the street from the pole and guy wire to Koutsky's saloon, he met deceased, and, as he reached the saloon door, looked back, and saw

him throw up his hands and fall, and on going across found him dead. The saloon keeper, Koutsky, says he saw him put his hands on the wire, and he dropped dead. Some effort is made to discredit the two lads who, at the time of the trial, a year later, were still only 16 years of age. It seems hardly worthy of counsel to do so. Their testimony is not volunteered, nor seemingly colored by any bias for the defendant, at least on the part of Strangland, with whom Dwyer's testimony is quite in harmony; and Connell's statement does not necessarily conflict with either, the only discrepancy being as to the time after they left till the fatality occurred, and the disagreement as to that is not serious. The fact that Connell did not see Vocasek till just as he was crossing to his death indicates simply that all three had started away without his observing them, or before he came. There seems no doubt as to the precise character of the occurrences. We are not of the opinion that they constitute *per se* contributory negligence, which must relieve the defendant from liability for this result of its admitted failure to exercise due care of its dangerous current. The fact that a large number of young men and boys were playing with this wire, touching it, and catching it, and pulling it away from its contacts with the other wire, and so making sparks, and that deceased himself had with impunity handled it earlier in the evening, was enough to disarm his caution, and deprive of its negligent character the contact which killed him. Unless the doctrine, which counsel partly claim in their brief, but expressly renounced at the argument, that a youth of 17 is to be presumed to know and consider, even against the evidence of his own eyes and sense of touch, that a waste current of electricity through a guy wire is dangerous, then this is not *per se* contributory negligence.

As to the second point, instruction No. 3 asked by defendant expressly tells the jury that voluntarily taking hold of a wire carrying a current from an electric light wire was such negligence as precludes recovery for the resulting death. If the foregoing conclusion as to the effect of such a condition of affairs with such a degree of continuance as in this case is correct, the instruction was rightly refused.

Instruction No. 5 also refused, is to much the same effect, with the additional suggestion that, if the deceased had a reasonable belief that his action was safe, it was still negligent. As we have concluded that what he had seen and experienced was sufficient to give the youth a reasonable belief that his action was safe, and therefore it was not negligent, it follows that this instruction was rightly refused. The fact that sparks came from the point of contact of the wires when the guy wire was pulled would seem to indicate that pulling broke the connection, and the fatal result was rather due to his simply seizing the wire, as described by the witness Koutsky. But, whatever weight might be given to the suggestion that the fatal current was due to deceased's pulling of the wires into contact, if taken by itself, the other matter in this instruction 5 vitiates it. It can hardly be possible that our youth are required, at the peril of their lives, to learn the actual, as distinguished from the reasonably apparent, qualities of wires stretched in much-frequented city streets.

The third error, of course, has to do only with the amount of damages, and not with the right of recovery. The jury assessed the full amount of damages allowed by the statute, and it is claimed that the trial court should not have permitted testimony that plaintiff had a wife, the mother of Robert, and other children, his brothers and sisters. Defendant claims that these facts appear in other parts of the record without objection, and, if their appearance at the place complained of is error, it is without prejudice. Of course, the establishment of the poverty of plaintiff, or the dependence upon him of the mother and other children, as a direct ground for the jury's action upon the matter of damages, is wholly inadmissible. The cases cited by plaintiff in error seem, so far as we have examined them, to be of that nature. Such is Judge Cooley's line of argument in *Railway Co. v. Bayfield*, 37 Mich. 205. But where it is claimed that deceased at the time of the injury was contributing to the assistance of the next of kin, his father, in the performance of the latter's legal duty of supporting the mother and other children, the fact of the existence of such mother and other children would seem to be entirely admissible, not as a direct

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ground for the jury's action, but as showing what deceased was doing, and likely to do, to make his life pecuniarily valuable to plaintiff. The evidence is admissible not as establishing directly a greater right to consideration from the jury, but as showing what consideration plaintiff was actually receiving, and likely to receive in the future, from his son.

It is therefore recommended that the judgment of the lower court be affirmed.

DAY and KIRKPATRICK, CC., concur.

PER CURIUM: For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Guy wires charged with electricity.—In the case of *Hayes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, a boy of the age of ten years, while walking along the sidewalk of a city street, took hold of a guy wire attached to an electric light pole and received a fatal shock of electricity. Such guy wire came in contact with a "feed wire," and was thus charged with the deadly current. The company maintaining the wire was held negligent. The court said: "Negligence has been said to be a failure of duty. Proof that there was a live wire, carrying a deadly current, down in the highway surely raised a presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant and was its property and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this live wire was in the street through no fault of its servants and agents. . . . It is due to the citizens that electric companies, that are permitted to use for their own purposes the streets of a city or town, shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great and the care and watchfulness must be commensurate to it. . . . All the reasons which support the rigid enforcement of the rigid rule against the carriers of passengers by steam, apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated, and it can as readily prevent the possibility, under ordinary circumstances, of the contact of wires that should not be allowed to touch one another."

New Omaha Thomson-Houston Electric Light Co. v. Johnson.

Notice of danger.—If there is nothing to indicate that a guy wire located near a sidewalk and used to support an electric light pole, is charged with electricity, and a traveler along the highway touches such wire and receives a shock, he is not guilty of contributory negligence. *Turton v. Powelson Electl. Co.*, 185 Pa. St. 406, 39 Atl. 1053.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO. v.
JOHNSON.

Nebraska; Supreme Court.

1. **STEPPING ON SCRAP IRON CHARGED WITH ELECTRICITY.**—Evidence held not to support a finding that plaintiff's intestate came to his death from accidentally stepping upon scrap iron electrically charged from the wires of the electric light company.
2. **EVIDENCE.**—Evidence held to show that, if fatal contact was with defendant's guy wire, such contact was voluntary, and after warning, on deceased's part.
3. **PRECAUTION BY COMPANY.**—Defendant company held to be under a duty to exercise all reasonable precaution against passing a dangerous current of electricity through a guy wire attached to a pole on a vacant and uninclosed lot in a densely peopled part of a city.
4. **INTOXICATION; CONTRIBUTORY NEGLIGENCE.**—Where there is very slight evidence of intoxication, it is not error to refuse an instruction telling the jury that contributory negligence, caused by intoxication, would be a defense, the court having fully instructed as to what would constitute contributory negligence.
(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. Decided February 4, 1903; reported (Neb.) 93 N. W. 778.

I. R. Andrews and *A. W. Jefferis*, for plaintiff in error.

Charles A. Goss and *Thomas F. Lee*, for defendant in error.

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Opinion by HASTINGS, C. :

July 15, 1900, Charles Johnson was killed by an electric shock obtained from a guy wire attached to a pole maintained by the defendant company upon lot 2 in block 87 in the city of Omaha. This lot was uninclosed and unoccupied. There was no public alley through the block, but there was a pathway used by the public towards the west side, running from Dodge street north to Capitol avenue. It also appears that the vacant lot on which the pole was standing was sometimes used by teamsters in turning around their wagons, and a footpath ran along its west side next to Burket's undertaking establishment, and foot passengers crossed the lot in various directions toward Capitol avenue. The company's pole seems to have been about 100 feet south of Capitol avenue and 20 feet north from the south end of the lot. This south end of the lot was bounded by a board fence, and between this fence and the pole was a pile of galvanized roofing, consisting, as one witness said, of half a load. Another said it was a light load for an express wagon. It is described as consisting of pieces 18 inches square and smaller. The guy wire had formerly been attached to a stump or stake about 50 feet southwesterly from the pole, but had been for some weeks detached, and the lower end coiled up and deposited in a box just south of the fence on top of which the wire rested. It seems to have rubbed against a wire carrying a heavy electric current until it had worn the insulation from the latter and had itself become charged with a powerful current. Plaintiff claims that the company was bound to know and guard against such danger. The guy wire, on the day of the accident, rested on this scrap iron about 15 feet south of the pole. It then passed along over such scrap iron, and up over the fence, and then down into a coil in the wooden box directly south of the fence. It is alleged that the plaintiff's intestate had no knowledge of electricity, and, unaware of any danger from contact with the wire or with the scrap iron, and while walking in the vicinity of the guy wire, without negligence on his part, he stepped on some of the scrap iron and received a shock because of which he fell upon the pile of scrap iron and upon the wire, with fatal result. He was 35 years old, strong, vigorous, industrious, and economical,

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and earning \$60 per month. The action was brought by his widow on her own behalf and her young son's. The company denied that she was the widow or administratrix of Charles Johnson; admitted its ownership of the electric plant; denied the rest of plaintiff's allegations; and alleged that plaintiff's intestate was guilty of contributory negligence, without which his injury would not have been received. The reply denied such contributory negligence. The jury found for the plaintiff in the sum of \$1,300. Motion for new trial was overruled, and from that judgment the company brings error.

Fifty-three assignments of error are laid in the petition. The brief filed on behalf of the company, however, complains only of error in refusing a peremptory instruction for the defendant at the trial; error in refusing to require plaintiff's attorney, who testified at the trial, to state on cross-examination the amount of his contingent fee; and error in refusing instruction 11 tendered on defendant's behalf, to the effect that, if the jury should find that plaintiff's intestate was under the influence of liquor, which caused him to neglect ordinary precautions, and by that reason he came in contact with the wire, and was killed, they should find for the defendant, even if they also found that the defendant had been negligent in regard to the guy wire. The reasons why the defendant claims it was error to refuse its request for a peremptory instruction are summarized in counsel's brief as follows:

"(1) The defendant therefore claims that because of the failure of the plaintiff to establish the allegation in his petition that he received his shock of electricity, while walking in the pathway, by reason of his feet coming in contact with scrap iron, and for the further reason that he was a mere licensee, to whom the defendant owed no duty, that the court should have sustained the motion of the defendant to instruct the jury to return a verdict for the defendant. (2) That the testimony fails to show that the alleged negligence of the defendant was the cause of the deceased's death. (3) That the uncontradicted evidence of five witnesses, and the circumstances surrounding the whole transaction, show clearly that the deceased came to his death owing to his own gross negligence and carelessness; that no two reasonable minds could possibly differ in regard thereto, and the court should have given instruction No. 1 asked by defendant. For the above reason this judgment should be reversed."

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The matters necessary to be determined in passing upon this case seem to be: First. Is the evidence sufficient to maintain plaintiff's claim that her intestate received an electric shock by his feet coming in contact with scrap iron as alleged? Second. If the evidence is sufficient to sustain that conclusion, was the condition of the wire and the scrap iron the result of negligence of any duty owed by the defendant to the deceased? Third. Does the evidence establish conclusively the contributory negligence of the deceased? Fourth. Was it error on the part of the trial court to reject the cross-examination of plaintiff's attorney as to the amount of his contingent fee, he having testified in the case? Fifth. Was it error on the part of the trial court to refuse the eleventh instruction, as to contributory negligence from intoxication?

An examination of the testimony submitted on the plaintiff's behalf compels the conclusion that the shock received by the deceased was not caused by an accidental stepping upon any of these pieces of galvanized iron which lay between the pole and the fence. The deceased had been engaged in moving his furniture that day. With the teamster who hauled it, Gust Nelson, he passed Nelburg's saloon, on Dodge street, south and a little west from this guy wire, and in the same block. While there it appears that information was brought in that an employe in Norris' restaurant, next door east of the saloon, had received a shock from this guy wire. The deceased and his companion started north along the pathway across the block, just west of the saloon which has been mentioned, and the restaurant keeper, Norris, testified that he told them not to go back there; that there was a live wire, and that they would be killed. Nelson neither admits nor denies this statement. They seem to have gone north as far as the rear end of Burket's undertaking establishment, which was at that time the first building west from the lot on which this pole and guy wire was situated. The fence along the south end of the latter lot commenced some 12 or 15 feet to the east of the southeast corner of Burket's building. To the east side of Burket's building was, as stated, a pathway running north to Capitol avenue. Between the corner of the Burket building and the fence was a pool of water. It had been raining very hard that

day, as all of the witnesses agree, and the day before. The pool of water was an inch or so in depth, and two or three yards in diameter, and was close to the west end of this fence. The guy wire rested on the fence about four feet from its west end. Nelson seems to have stopped at some point outside of the vacant lot where the pool stood, and west from the wire, and Johnson approached it from the west. Nelson is either unable or unwilling to say precisely how Johnson came in contact with it, but knows that a few minutes later Johnson was lying on the ground, with his feet still in this pool of water, his head towards the east, face downwards, and with this guy wire, and one hand at least, and perhaps both of them, under him. A lad in the neighboring building to the east says that his attention was attracted by a loud report like that of a gun; that he looked out, and saw Johnson fall forward, and immediately ran to call somebody, and found Mr. Bell, and a policeman. The policeman does not testify, but the witness Bell declares that while Johnson was lying on the ground with the wire under him and his feet in this pool of water, so strong a current of electricity was passing through his body that when he took hold of Johnson's wet clothing he received a shock, and it gave out sparks; and when the policeman took hold of Johnson's pants it brought a strong discharge. Johnson was finally pried off the wire with a dry board, and carried away. There is no testimony that the scrap iron extended into the pool of water. It seems clearly established that Johnson fell forward with his feet extending into that pool. It seems clearly impossible that any shock could have been sustained by stepping upon one of these fragments of scrap iron lying upon the ground saturated with water. Of course, the shock could have been sustained by stepping upon scrap iron, which was itself in contact with the wire, only as the result of insulation both of the wire and the iron. If either the wire or the iron was "grounded"—that is, was in contact with moist earth—it would be a better conductor than would the human feet and body, and no current through the latter capable of producing an injury would be so caused. There is an entire failure to establish either the contact with the scrap iron or the latter's insulation, and no evidence from which the jury

could find it, except the fact of the shock being received. Practically that much was admitted by plaintiff's counsel. In order that the fact of the shock being received may furnish an inference that it came from the scrap iron, the supposition that it was otherwise obtained must be excluded. That is far from being done. Three witnesses swear in positive terms they saw the deceased walk up to and seize in his hands the guy wire close to the point where it passed over the fence after resting upon the pile of scrap iron. It seems impossible, under such circumstances, to sustain the jury in finding that the deceased received his injury from accidentally stepping upon a charged piece of the scrap iron. Of course, deceased's taking up the wire in his hands, if it was resting on the pile of scrap iron, and he drew it away from such contact while his own feet were in the pool of water, would make his own body complete a ground circuit, and fully account for the shock that he received. It seems true that, as he lay, his body was partly upon the pile of scrap iron, but there is nothing to support the inference that the shock which threw him down there came from contact with it, and it does appear that, as soon as his body was gotten off the wire, the current stopped, and there was no difficulty in removing him. It is clear that he fell forward with his feet still in the water, where a shock from stepping on scrap iron would be impossible.

The extensive argument of counsel that there was no duty owed by this electric light company to the public to render their appliances and guy wires on this vacant lot safe can hardly be sustained. The public was in the habit of passing back and forth across it in various directions, but principally along the path upon the east side of Burket's building, which came within 15 or 20 feet of the pole and of the lower end of the guy wire. It appears that the wire had been loosened and across the power wire for several weeks. There is evidence tending to show that an electrician in the employ of the company had discovered that the guy wire was charged with a current nearly four weeks before this accident occurred. While it is true that a bare licensee usually takes the risk of the premises as he finds them, yet he has rights. It is clear that the general public was licensed by its condition, and the practice which grew out of

that condition, to pass over this lot. To throw, without warning, a deadly electric current down this guy wire, would seem to be strictly analogous to running a licensee down without warning, which, it has been often held, may not be done.

The defendant's claim that contributory negligence of the deceased conclusively appears could hardly be maintained if the evidence was sufficient to warrant the jury in finding that he came to his death by stepping upon one of these pieces of roofing iron. If we were able to say that the evidence warranted the jury's finding as to that, we would be compelled to say that it could not be held, as a matter of law, that stepping on such piece of iron was contributory negligence on the part of one ignorant of the dangers from electricity. The evidence going to establish contributory negligence is just as conclusive in favor of the proposition that he came to his death by voluntarily taking hold of the wire, as to which he admittedly had warning. It is, therefore, only by holding that the specific negligence alleged was not the cause of his death, and that the evidence does not support such a finding, that the contributory negligence can be held to be conclusively shown. As we have held that the evidence is not sufficient to warrant any inference that he died from stepping upon an electrically charged piece of scrap iron, it seems to follow that it must be held that he voluntarily approached and seized the wire. It seems clear that the trial court should have instructed for a verdict in favor of defendant upon this evidence, and that for this reason the judgment must be reversed.

It is not necessary, in this view of the case, to discuss the alleged error in refusing to allow the plaintiff's attorney, when produced as a witness, to be questioned as to the amount of his contingent fee. It would seem clear that, where an attorney proffers himself as a witness, and admits that he has a contingent fee in the case, the jury are entitled to know and consider the amount of that fee as one of the circumstances affecting his credibility.

With regard to the instruction 11 tendered, the trial court seems to have instructed fully as to what would be the effect of contributory negligence if that question was to be submitted to the jury. Whether such contributory negligence was caused by intoxication

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or otherwise would seem not to be material. The proof of intoxication was very slight. One witness said that he seemed to have been drinking, and there is testimony of his having taken one glass of beer with the witness Nelson. It is not thought that there was any error in refusing to give special prominence to this question of intoxication as tending to make probable the truth of the positive statement of the witnesses who were swearing to the deceased's voluntarily picking up the wire, when it clearly appears that he had full knowledge that one person had just received a severe shock, and that he was warned against it.

It is recommended that the judgment of the District Court be reversed, and the case remanded.

KIRKPATRICK and LOBINGIER, CC., concur.

Per CURIUM: For the reasons stated in the foregoing opinion, the judgment of the District Court must be reversed, and the case remanded.

HAMILTON V. BORDENTOWN ELECTRIC LIGHT & MOTOR CO. ET AL.

Supreme Court; New Jersey.

1. DUTY AS TO INSULATION.—It is the duty of a company maintaining in a public street an insulated electric light wire carrying a dangerous current to use reasonable care that an uninsulated telegraph wire does not come in contact therewith and remain so long as to wear off the insulation, so that the current is diverted into the telegraph wire, and by it carried to a third wire, from which it is conducted to and against and injures a person lawfully using the public streets.
2. UNINSULATED WIRE COMING IN CONTACT WITH ELECTRIC LIGHT WIRE.—It is the duty of those maintaining an uninsulated telegraph wire in a public street to use reasonable care that it does not break and come in contact with an insulated electric light wire carrying a dangerous current, and remain so long as to wear off the insulation, and divert the current from the electric light wire through it to another wire, to the injury of a person lawfully using the public street.
(Syllabus by the Court.)

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Demurrer to declaration. Decided June 9, 1902; reported 68 N. J. Law, 85, 52 Atl. 290.

Charles E. Roberts, for plaintiff.

Howard Flanders and *Samuel W. Belden*, for defendant Bordentown Electric Light & Motor Co.

Edward A. & William T. Day, for defendant Delaware & A. Telegraph and Telephone Co.

J. H. Gaskill, for defendant Pennsylvania R. Co.

Opinion by GARRETSON, J.:

This suit is by an administratrix to recover damages for the benefit of the next of kin of the intestate, who is alleged to have been killed through the negligence of the defendants under the following circumstances: The Bordentown Electric Light & Motor Company maintained a line of poles and electric light wires carrying an intense and dangerous current in Burlington street, in the city of Bordentown. This line was crossed above it by a telegraph wire maintained by the three other defendants. This last line ran around into Carpenter street, in Bordentown, and was there crossed above it by a wire of the Bordentown Telephone & Telegraph Company, not a defendant to the suit. The wire of the Postal Telegraph & Telephone Company, Delaware & Atlantic Telegraph & Telephone Company, and Pennsylvania Railroad Company broke, and came in contact with the wire of the Bordentown Electric Light & Power Company, swinging against it, and wearing off the insulation of the wire, and thereby became charged with the dangerous current carried by the wire of the electric light company. The wire of the Bordentown Telephone & Telegraph Company broke, and fell into Carpenter street, and the plaintiff's intestate took hold of it to remove it from obstructing the street, when it came in contact with the highly charged telegraph wire of the three companies, which was below it, and thereby became in its turn charged with the

current which had gone into the wire of the three companies by reason of the contact with the electric light wire, and so the dangerous current of the electric light wire was transmitted to and killed the plaintiff's intestate.

The allegation of negligence and breach of duty on the part of the defendants was that the wire of the Postal, Delaware & Atlantic, and Pennsylvania Companies had become cut and broken, and had been negligently and carelessly permitted by all the defendants to swing, rub, and come in contact with the electric light wire for so long a time that the insulation of the electric light wire became worn off by the rubbing, so that the electric current of great power and intensity from the electric light wire was communicated to and ran along and through the wire of the Bordentown Telephone & Telegraph Company to the plaintiff's intestate, thereby killing him. This seems to be a sufficient allegation of negligence on the part of the defendants. It is assumed that the defendants were each maintaining wires in the public highways in the exercise of a franchise; hence each was bound to take reasonable care not to injure other users of the street. It was the duty of the electric light company to use reasonable care that other uninsulated telegraph wires that crossed it should not be allowed to come in contact with its wire, which was insulated, and which carried a powerful electric current, and remain for so long a time in contact therewith as to wear away the insulation, and divert the powerful current to the telegraph wire, to the probable injury of persons who should come in contact with the telegraph wire, or in contact with other wires which might be brought in touch with the charged telegraph wire. It was the duty of the three companies maintaining the telegraph wire to use reasonable care to prevent their wire from coming in contact with the highly charged electric light wire, and remain in contact therewith in such a way and for so long a time as to wear off the insulation and divert the current to its own wire, to the danger of those who should touch it, or touch another wire with which it might come in contact. *Telephone Co. v. Bennett*, 7 Am. Electl. Cas. 543, 62 N. J. Law, 742, 42 Atl. 759.

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One cause of demurrer assigned is that there is no allegation in the declaration that the decedent left any widow, children, or next of kin. The plaintiff avers in the declaration that "the next of kin of the deceased and the said plaintiff, as administratrix, as aforesaid, by reason of the premises, were forced to pay, lay out, and expend, and necessarily did lay out and expend, divers large sums of money," etc., "and that the next of kin of the deceased have, by reason of the premises, sustained and suffered great loss, injury, and damage, to wit, the sum of twenty thousand dollars, whereby, and by force of the statute in such case made and provided, an action hath accrued to said plaintiff as administratrix of the goods and chattels, rights, and credits of the said deceased, for the exclusive benefit of said next of kin." There is a necessary inference from these allegations that there are next of kin. The action being brought for their exclusive benefit, the plaintiff cannot recover except upon showing that they exist. In *McGlone v. Transportation Co.*, 37 N. J. Law, 304, it was held not necessary to name the widow and next of kin, but that a general allegation that there is in existence a person or persons injured to whose benefit a recovery will inure is sufficient. This appears in the allegations set forth.

The demurrer is overruled, with costs.

Thomas v. Wheeling Electrical Co.

THOMAS V. WHEELING ELECTRICAL CO.*West Virginia; Supreme Court of Appeals.*

1. **DUTY OF ELECTRIC COMPANIES AS TO INSULATION OF DANGEROUS WIRES.**—It is the duty of electric companies to use very great care to keep the insulation of dangerous wires perfect at places where people have a right to go for work, for business, or for pleasure.
2. **NEGLIGENCE OF ELECTRIC COMPANY.**—When injury to a person comes from contact with a live electric wire, because of bad insulation at a place where there ought to be good, safe insulation for safety to persons, it is a case of negligence on the part of the electrical corporation, rendering it *prima facie* liable.
3. **CONTRIBUTORY NEGLIGENCE IN TAKING HOLD OF ELECTRIC WIRE.**—If one take hold of an electric wire at a place where it ought to be safely insulated, and is injured by reason of defective insulation, he not knowing its defect, he is not, for so doing, guilty of contributory negligence forbidding recovery of damages. One coming in contact with a live electric wire in discharge of duty will not, on account of so coming in contact, be guilty of contributory negligence, if it was the duty of the corporation to properly insulate the wire at the place of injury, and it has neglected to do so, and the person does not know of the defective insulation.
4. **ASSUMPTION AS TO INSULATION.**—In places where electric wires should be insulated for safety to persons, one may assume that they are so insulated, if he did not know to the contrary.
5. **ANTICIPATION OF INJURY FROM DEFECTIVELY INSULATED WIRES.**—A corporation or person operating a plant for electric lighting must anticipate injury as likely to happen to persons from contact with its wires by reason of defective insulation at places where the law requires such insulation.
6. **SETTING ASIDE EXCESSIVE VERDICT.**—The verdict of a jury in an action for death from wrongful act cannot be set aside for excessiveness in an amount under \$10,000, their assessment being final, unless the verdict be the result of passion, prejudice, partiality, or corruption on the part of the jury.

Error by defendant from judgment for plaintiff. Decided December 12, 1903; reported (W. Va.) 46 S. E. 217.

Caldwell & Caldwell and *J. A. Howard*, for plaintiff in error.

J. J. Coniff, for defendant in error.

Thomas v. Wheeling Electrical Co.

Opinion by BRANNON, J.:

On the front of the Grand Opera House, on the corner of Market and Twelfth streets, in the city of Wheeling, is a balcony 8 feet long, 3 feet wide, 30 inches high, with a rail 8 inches wide. Out from the building at the street curb stood a pole, and from it two wires conveying electricity for light, belonging to the Wheeling Electrical Company, extended by a sharp angle to a bracket on the north wall of the opera house. These wires passed close to the rail of the balcony, 18 or 20 inches from it, one 6 inches above the other. The balcony is used for people to go out upon through a window of the opera house opening upon it. There had been a converter or transformer on this balcony from which two wires ran to the main wires just mentioned; but the transformer was removed, and the two wires connecting it with the wires outside the balcony were cut away at the point of their union with the two wires outside the balcony, and in doing so the defendant left the ends of the wires stick out, and did not properly wrap them, and did not cover them with tape, and the old insulating material did not cover the point, and was worn and dangerous. It was clearly shown that the wires in this condition were extremely dangerous; this was not a disputed fact, the officers of the company stating on the stand that they were so dangerous that contact with them would kill. They remained in such condition a long time, without inspection. An opera company which had leased the building for a term had been performing in it, and had tacked advertising banners on the balcony, and, when about to close its performance there, employed Earl J. Thomas, 21 years of age, 5 feet 11 inches high, to gather these banners on Market street, and he went out upon this balcony to untack from the balcony some banners which had been tacked upon it, one of them on the north end of the balcony by which the wires ran, the banner being tacked on the top rail and on the lower part of the balcony. While engaged in this work, between 7 and 8 o'clock of the night of 2d November, he came in contact with one of the electric wires. He was seen grasping the wire with his left hand, his right hand on

the left wrist, leaning against the corner of the brick wall at the junction of balcony and wall, apparently fastened or transfixed by the shock, and when jerked away by a person who went to his rescue fell lifeless to the balcony floor. He was apparently dead while standing against the wall with the wire in his hand. Whether he took hold of the wire to steady himself when intending to reach down to loose the lower corner of the banner, or how or why he took hold of it, does not appear. He was simply seen grasping it, fastened to it. The upper corner of the banner had been loosed by him. His administrator brought an action against the company to recover damages for his death, and by the verdict of the jury recovered \$7,500, on which judgment was rendered. The company brings the case here, assigning 43 errors.

Complaint is made that the second count states the duty resting on the defendant as too high and stringent. That is mere allegation of law, and immaterial. Pleadings should state facts, not law. Facts only are necessary to be stated, not arguments and inferences. Where a declaration, after stating facts, alleges that it thereupon became the duty, etc., the allegation is to be understood as a mere legal liability supposed to result from the facts, and as an assertion that the defendant became bound in law to a legal liability, and not as a substantive allegation. The allegation of duty is superfluous where the facts show a legal liability, and is useless where they do not. 1 Chitty, Plead. 236; 2 Chitty, Plead. 476. It is not claimed that the facts stated in this count do not raise a duty. The matter complained of is surplusage. It would not vary or prescribe the proof. "It is only necessary to state facts, and never is it necessary to aver matters of law in a declaration." "Surplusage never vitiates a declaration, and is treated as if it had never been inserted therein." Hogg's Plead. & Forms, 59; Andrews' Stephen's Plead. 411.

The defendant complains of the following instruction given for the plaintiff: "The court instructs the jury that it was the duty of the defendant to not only protect any portion or portions of its wires in close proximity to the north end of the balcony, mentioned in evidence, that may be exposed, by proper insulation, so that

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persons coming in contact therewith in the performance of their work would not be injured, but it was also the duty of the defendant, by proper inspection from time to time, to see that said insulation was kept in a proper condition." It is said that this instruction takes for granted that the wire was exposed and not properly insulated. I do not think so. It simply states a legal proposition, and does not intimate an opinion on the facts. Other instructions told the jury that it must pass on those facts on the evidence.

It is further argued that the instruction misleads. It is claimed that it should have incorporated the principles of instruction 12 in *Snyder v. Wheeling Electrical Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 672, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, that it should have submitted the question whether the defendant was bound to anticipate injury to any one from the position of the wire, or that persons would come in contact with it in performing any work. As we said in the Snyder Case, an electrical company, using a dangerous power, is required to use very great care and diligence to avoid danger. It is bound to anticipate danger and properly insulate its wires, and inspect and keep them so, at certain places, but not everywhere. It is bound to expect certain accidents in certain ways or from certain causes, but not all accidents from every cause. Whether a place is such, under the evidence, as to require insulation, is generally a question for the jury. Whether, if such a place, the accident is such that might have been anticipated, is a question of fact for the jury. But sometimes negligence is a question of law for the court. "Where there is no controversy in regard to the facts or inferences that may be fairly drawn from them, the question of negligence is one of law for the court." *Woolwine's Adm'r v. G. & O. R. R. Co.*, 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; *Johnson v. Railroad Co.*, 25 W. Va. 570; *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683. It is undisputed that the balcony was for persons to go upon, and that they did go upon it, and that the wire was distant only 20 inches from its railing, and was thus in close proximity to the balcony. "A company maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous

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to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places." Joyce on Electric Law, sec. 445; 1 Thompson on Negligence, sec. 800; *Brown v. Edison* (Md.) 7 Am. Electl. Cas. 576, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; *Perham v. Portland Co.*, 7 Am. Electl. Cas. 487, 33 Ore. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Clements v. Louisiana Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *W. U. Co. v. State* (Md.), 6 Am. Electl. Cas. 210, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Snyder v. Elec. Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. Persons on the balcony might thoughtlessly lean over or stretch out the arm and come in contact with the wire. A workman repairing the balcony or painting it, or hanging show banners on it or removing them from it, might come in contact with it. These considerations tell us that the court did not err in telling the jury in this instruction that insulation was, at this balcony, a duty imposed by law upon the defendant. It took from the jury only one question, that is, whether the defendant was under duty, at the balcony, to insulate its wires, and inspect them and keep them insulated. It does not intimate that the defendant was bound to anticipate the particular accident. It is argued that the instruction implies that the defendant must anticipate accident. It does not do this. I think that where the place is one that demands insulation of wires, there the company is held to anticipate contact with the wires; for it is the fact that persons may there come into such contact that imposes the duty of the insulation. When injury to a person is received at such a place from want of proper insulation, the company using the wires is *prima facie* liable, unless there be contributory negligence. It is a clear duty to insulate in such places. It is true that sometimes, I may say generally, one is only bound to anticipate such combination of cir-

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cumstances and accidents and injuries as he may reasonably forecast as likely to happen, taking into account his own past experience and the practice of others in similar circumstances, together with what is inherently probable in the condition of the instrument (wires in this case) as it relates to the conduct of the business. So we said in *Snyder v. Electrical Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 672, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. But where law requires a particular precaution for safety, and if damage flowing from its omission makes it a cause of liability, the above rule does not apply. In other words, the law demands insulation, and if damage arise from its want the law gives action for its omission. Therefore, when the defendant failed to insulate, it was bound to anticipate accident from that failure. It must foresee that it is likely to happen. The accident is the result of the neglect—the probable from it. These views sustain the court in giving plaintiff's instruction 1, and refusing defendant's 14 and 15. The former says that though the defendant did fail to insulate and inspect, yet that if injury by contact with the wire under the circumstances of the case was not, and could not be, foreseen by an ordinarily prudent and careful man as reasonably likely to flow from failure to insulate and inspect, then the injury was not the proximate cause of such failure, and the jury should find for the defendant. The other instruction is substantially the same. Notice in instruction 12 in the Snyder case the words "together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." Even under this the defendant would, in this case, be bound to anticipate accident. Would it not, in the conduct of its business, be bound to look for accident from known defect of wires, from an omission of a plain duty imposed upon it by law?

The plaintiff's instruction 2 is contested. "The court instructs the jury that if they believe from the evidence that Earl Thomas was attempting to release the banner on the north side of the balcony mentioned in evidence, and leaned over the balcony in such a way that he was brought in close proximity to the wire of the defendant, and that by some accident his hand came in contact with

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said wire, and that said wire at the point of contact was improperly insulated, and that he thereby received from said wire the shock of electricity which caused his death, and further believe that he received such a shock of electricity by reason of the failure of the defendant to properly insulate its wires at the point where Earl Thomas came in contact therewith, then the jury should find a verdict for the plaintiff." It is said there was no evidence that by accident the hand of Thomas came in touch with the wire. Whether he purposely did so, or his hand unintentionally came in contact, or whether he did so to steady himself, or to save himself from falling, were questions for the jury on the evidence. It is said that it took from the jury the question whether he received his death from "the" shock of electricity, instead of "a" shock. This is too refined a criticism. The words "if they believe from the evidence" applied to this cause, and left it to the jury to say whether death came from the shock of electricity.

Instruction 3 seems proper—"The court instructs the jury that if they believe from the evidence that one of the wires of the defendant, in close proximity to the north end of the balcony mentioned in evidence, was not properly insulated, and that Earl Thomas was attempting to release the banner on the north end of said balcony, and leaned over said balcony, and, without negligence on his part, was thereby brought in contact with said wire where it was improperly insulated, and by reason of such contact received a shock of electricity from said wire which caused his death, then the jury should find a verdict for the plaintiff."

Instruction 4: "The court instructs the jury that even if they believe from the evidence that Earl Thomas knew of the presence of the wire of the defendant company near the balcony mentioned in evidence, and further believe that when in the act of releasing or attempting to release the banner on the north end of said balcony he was brought in such close proximity to such wire that he took hold of the same to support himself, this fact will not excuse the defendant from liability if the jury believe from the evidence that Earl Thomas did not know that it was dangerous to touch said wire, and that he, in taking hold of said wire, received such a

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shock of electricity by coming in contact therewith that his death was caused thereby, and provided further that the jury believe such shock was caused by defective or improper insulation of said wire at the point where Thomas came in contact with it." It is said there was no evidence going to show that Thomas took hold of the wire to support himself, and there was no need for him doing so, the rail of the balcony being in front of him, and he would not seize a wire 30 inches away. Now, the jury had from evidence and the nature and circumstances to say how Thomas came to take hold of the wire, to form a conclusion upon that question, by inference from the circumstances, and this objection cannot be held good. It is also said that the jury could not find that he did not know it was dangerous to take hold of the wire, he having had experience in working with electric wires. If a wire is insulated, there is little or no danger in taking hold of it, as all persons of experience know. Hence the courts have said that, as it may be presumed that in places where there should be there is such insulation, a person is not guilty of contributory negligence in taking hold of one, if the person do not know of defective insulation. It was dark at the time of the occurrence. *Griffin v. United Elec. Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Clements v. La. Elec. L. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Brown v. Elec. Co.*, 7. Am. Electl. Cas. 576, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; Joyce on Electric Law, sec. 445. It is said the last part of the instruction does not tell the jury that it must find from the evidence as to insulation. The instruction opens with the requirement that they find facts from evidence, not from guess; such is the purport of the instruction. Can we surmise that the jury did not know this?

Plaintiff's instruction 5: "The court instructs the jury that if they find for the plaintiff they shall assess such damage as they think fair and just, not exceeding ten thousand dollars." This is in the language of section 6, ch. 103, Code 1899. Certainly there can be no error in an instruction in the words of the law. It seems

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to be urged that the instruction should not have been given in this form, but that the court should have instructed that the jury must give only compensative damages for pecuniary loss, and not for solace or consolation, to the father, who gets the recovery as sole distributee, and it does not appear that the deceased contributed to the father's support. In connection with the instruction it is urged that the construction given this statute in *Turner v. Railroad*, 40 W. Va. 675, 22 S. E. 83, and *Sample v. Light*, 50 W. Va. 474, 40 S. E. 597, 694, 57 L. R. A. 186, is not the proper construction. Those cases hold that in actions for death under the statute no damages found by the jury can be deemed excessive to set aside the verdict, its determination being absolute and exclusive as to what amount is fair and just, unless the verdict evinces passion, prejudice, partiality or corruption in the jury. Authorities are cited from other States to show that in them the statute only contemplates actual, pecuniary loss. The construction given a statute similar to ours in two Virginia cases cited by Judge DENT in the Turner case agrees with that case. As shown in the Virginia cases, and by Judge SNYDER in *Searle v. Railroad Co.*, 32 W. Va. 377, 9 S. E. 251, our statute differs from the English act and the acts of other States in that those acts give damages for "pecuniary injuries resulting," whereas our statute omits those words, limiting recovery to compensation for "pecuniary injuries," and says that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars." Code 1887, ch. 103, sec. 6. Observe the statute is broad. It says, "whenever the death of a person shall be caused by a wrongful act, neglect or default, . . . the person who, or the corporation which, . . . shall be liable." Id. sec. 5. It applies to persons and corporations, making them equally liable, and the power given the jury applies to both. There is no discrimination. We are cited to *Ricketts v. Ches. & O. R. Co.*, 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901, holding that corporations are not liable to punitive damages for wrongs, but only compensatory damages, even where the act is wanton, willful and malicious on the part of those acting for the corporation, unless

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the act is expressly or impliedly authorized or ratified by it. Such seems to be the better rule, though there are cases to the contrary. *Lake Shore Co. v. Prentice*, 47 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Spellman v. Richmond R. Co.* (S. C.), 14 S. E. 947, 28 Am. St. Rep. 858, 876; *Warner v. Southern Pacific Co.* (Cal.), 45 Pac. 187, 54 Am. St. Rep. 327; *B. & O. R. Co. v. Barger* (Md.), 45 Am. St. Rep. 319, and note; 1 Sedgw. on Dam. sec. 380. This is because corporations act only through agents, and are held to be incapable of malice and wantonness. Many cases, however, hold that as they act only by agents, if not held as individuals for their acts, they would enjoy an immunity above others by that rule, and might do great wrong without the ability in courts to deter others by making an example of them. However, the Legislature has power to subject them to punitive damages, and we think that it has done so in this act. It is an exception to the general rule. Moreover, the jury in this case was not confined to damages at once ensuing to the father of Thomas. It could include probable pecuniary damages that might ensue in future; for the father was a workman, and might come to great age and want, might be a paralytic. So we cannot say this verdict is clearly punitive for smart money. *Searle v. Railway Co.*, 32 W. Va. 377, 9 S. E. 248. We cannot overrule the Turner case. We regard it sound law under the statute. But it is said that even under that case we ought to set aside the verdict, because its amount shows it to be the child of passion, prejudice, or partiality. It may be a hard, severe verdict in amount; but if the jury has almost unlimited discretion, we hardly see our way to interfere. There is nothing *dehors* the record to show such passion, nothing but the circumstances of the case; and the case being one of death, we do not see our way, in view of the power of the jury under the Turner case, to set aside its actions. That would seem generally to render the meaning given the statute in these cases nugatory. Rare must be the cases where the court can interfere for passion, prejudice, or partiality. The power of juries under this statute being so wide, it is not improper to address to them the admonition to be cautious, fair, just, and reasonable in fixing damages.

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Exception is made to the action of the court in refusing instructions asked by the defendant. It asked 22, and was granted 10. A number of those refused presented the theory of contributory negligence by Thomas as a defense. In the first place, the court gave four instructions fairly and sufficiently presenting this defense, and others touching it were merely repetitive. In the next place, contributory negligence was not admissible really in the case; at any rate, upon writ of error we can see that we ought not to reverse on that ground, because it was not an adequate defense, and if the jury had found for it, the verdict would have been wrong. The evidence clearly shows, even the evidence of the defense, that the defendant left the wire uninsulated, and the original insulation had become old and dangerous. Thomas was at work on the balcony removing banners put there, by consent of the lessee of the theater, to advertise a show exhibiting in the opera house, and thus Thomas was there of right. He did not know of the defective insulation. It was dark, between 7 and 8 o'clock in a November night. There was some light in the street, and a little light at the theater window, not its main entrance, not enough to detect the bad insulation. Thomas had some experience with electric wires, but that told him that wires were usually covered and safe, and, under the law given above, he had a right so to assume. Add to this decision of courts that to touch a wire, ignorant of defective insulation, is not negligence. How, then, can we attribute negligence to Thomas to atone for the gross, long-continued neglect of a company at this public place to use the ordinary care of protecting the wire? One touching a wire where the insulating material is worn off is not guilty of contributory negligence if he did not know its condition. *Griffen v. United Elec. Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. One taking hold of an electric wire badly insulated, ignorant of it, not denied recovery. *Giraudi v. Elec. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114. Contributory negligence is not imputed to one who fails to look out for danger when there is no reason on his part to apprehend it. Every one has a right to presume that another, owing a special duty to guard

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against danger, has performed it. *Engel v. Smith* (Mich.), 46 N. W. 21, 21 Am. St. Rep. 549. I consider this law sound, and very apt in this case. "One coming in contact with an electric wire in the necessary discharge of duty will not on that account be guilty of contributory negligence, if it was the duty of the corporation owning such wire to keep it insulated, and it has neglected this duty, and there was nothing in the appearance of the wire to indicate to the person injured such neglect, though he had been cautioned to be careful of the wires and to keep away from them." *Clements v. La. Elec. L. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348. "Nor will contributory negligence be ascribed to an innocent person because he failed to suspect that a corporation exposing dangerous wires on a side of a building would neglect properly to insulate them." 1 Thompson on Negligence, secs. 190, 800. This is a very late and fine work of high authority on an important subject. "In many situations a man is justified in law in acting on the presumption that other men have acted lawfully, rightly, carefully, and properly, until he is in some way admonished to the contrary. For example, a workman employed to load, ride on, and unload an elevator is not necessarily negligent in assuming that the elevator is safe." 1 Thompson on Negligence, sec. 190. Of course, under these principles, there is no error in refusing an instruction requiring the jury to find for the defendant.

The defendant makes many exceptions to the refusal to allow certain questions to be answered, some of which seem not to be much relied upon. Seeing that there was a very full presentation of both sides in the evidence to the jury, and as the case is not to be retried, and they involve no important or new principles, we shall not discuss them to any extent. It is complained that the court ought not to have allowed Feinler, Richardson, and Wilson to testify that they knew of no inspection of the wires by the company. They were about the building, and had opportunity for investigation. It was proper to go to the jury for what it was worth.

It is complained that the court would not allow questions to be answered as to whether banners had not previously been often safely put on and taken from the balcony. I do not see that this is admis-

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sible. Certainly not sufficient in materiality for reversal. It only tends to show negligence in Thomas, and, as we have seen, that defense cannot prevail. In fact, evidence to prove this was before the jury. As to many questions we may guess the expected answer, and what was intended to be proven, but it is not shown. Unless a question necessarily imports an answer, we must be told what it was proposed to prove, else we cannot say that the witness could give any answer, or what answer would have come, and cannot tell of its materiality. We could not be asked to reverse under such circumstances. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159. The question specified in assignment 15 was answered, and the answer was not excluded. This objection applies to assignments 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24. But I may remark, as to the claim that some of the questions aimed likely to show that the damage came from the wire of another company, that the evidence is clear and unanswerable that Thomas was seen with his hand on defendant's wire, and that this killed him, as he was leaning against the wall just there, and when he was pulled away dropped dead, and the defendant's wire was incontestably bad. What else could have killed him? Such proposed evidence would have been without force before the jury, and its rejection is without materiality on writ of error. We can see this plainly. The theory, too, that deceased might have been injured by having a stick, ironed at ends, and thus produced the injury, is utterly without force.

For these reasons, with some reluctance as to the amount of the judgment, we affirm it.

Proof of negligence as alleged.—In the case of *Barrett v. Independent Telephone Co.*, 65 S. W. 128 (Tex. Civ. App. 1902), which was an action against a telephone company for negligently permitting its wires to come in contact with high current wires, thus injuring the plaintiff, it was held not error to require the plaintiff to prove the negligence as he had alleged it in his complaint.

Degree of care to be used as to insulation.—The courts in nearly all the cases hold that a company maintaining electric wires which, because of the dangerous character of the current carried by them, are likely to cause injury to those coming in contact with them, shall exercise the utmost care to keep such wires in a condition of perfect insulation at places where persons in the exercise of their rights may come in

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contact with them. In addition to the cases cited in the opinion in the above case, the following may be cited: *Macon v. Paducah St. Ry. Co.*, 7 Am. Electl. Cas. 630, 23 Ky. Law Rep. 46, 62 S. W. 496 (holding that persons using electricity for lighting or propelling cars, or other business, must exercise the highest degree of care for the protection of all persons in all places where such persons have a right to be); *McLaughlin v. Louisville Electl. L. Co.*, 6 Am. Electl. Cas. 255, 37 S. W. (Ky.) 851, 34 L. R. A. 812; *Overall v. Louisville Electl. L. Co.*, 7 Am. Electl. Cas. 521, 47 S. W. (Ky.) 442; *Schweitzer's Adm'r v. Electric Co.*, 7 Am. Electl. Cas. 571, 52 S. W. (Ky.) 442; *Thomas' Adm'r v. Maysville St. Ry. Co.*, 7 Am. Electl. Cas. 587, 56 S. W. (Ky.) 153; *Will v. Edison Electl. Illum. Co.*, 7 Am. Electl. Cas. (Pa. Sup. Ct.) 642 (holding that a company using so dangerous an agency as electricity is bound to use the very highest degree of care to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them; not only to make its wires safe, but to keep them so); *Newark Elect. L. & P. Co. v. Gardner*, 6 Am. Electl. Cas. 275 (U. S. Cir. Ct. App., 3rd Cir.); *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264; 114 N. C. 203, 19 S. E. 344; *Denver Consolidated Electl. Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499 (holding that while it undoubtedly is the better practice to charge the jury that the defendant was bound to exercise that reasonable care and caution which should be exercised by a reasonably prudent and cautious person under the same or similar circumstances, that the care increases with the danger, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger—still where peril to the public is inherent in the very nature of the business, it is not error to instruct the jury that the duty of the defendant is the exercise of the utmost care); *Giraudi v. Electric Imp Co.*, 5 Am. Electl. Cas. 318, 107 Col. 120, 40 Pac. 108; *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 87 Hun, 355, 34 N. Y. Supp. 379.

In other cases it has been held that a wire carrying along a public street, in a densely populated city, electricity with a voltage sufficient to inflict serious physical injuries, is a constant and imminent menace to the safety of those who approach it, and requires a degree of care in its creation and maintenance commensurate with its liability to do injury. *Wittleder v. Citizens' Electl. Illum. Co.*, 7 Am. Electl. Cas. 581; 47 App. Div. 419; 62 N. Y. 297; *Newark Elect. L. & P. Co. v. McGilvery*, 7 Am. Electl. Cas. 529, 62 N. J. Law, 451, 41 Atl. 955; *Larson v. Central Ry. Co.*, 56 Ill. App. 263; 6 Am. Electl. Cas. 302, note. In the case of *Perham v. Portland Elect. Co.*, 7 Am. Electl. Cas. 487, 33 Oreg. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799, it was held that the care demanded of electric companies must be commensurate with the danger, and, where their wires are carrying a highly dangerous current of electricity, the law imposes upon the company the utmost degree of care in their construction, inspection and repair, so as to keep them harmless at places where persons are liable to come in contact with them; and whether such care has been exercised in a given case is ordinarily for the jury.

Nelson v. Branford Lighting & Water Co.

DANGEROUS WIRES IN ACCESSIBLE PLACES.**NELSON V. BRANFORD LIGHTING & WATER CO.***Connecticut; Supreme Court of Errors.*

1. **INJURY TO BOY BY CONTACT WITH WIRE ON IRON BRIDGE; PROOF OF NEGLIGENCE.**—An iron bridge was constructed over a stream by a municipality. It was frequently used by the boys in the neighborhood to dive from into the stream. The defendant erected its wires over and along the trusses of the bridge. The bridge was used thereafter in the same way by boys in bathing in the stream. The wires of the defendant were not insulated so as to make them safe to personal contact. There was no notice given that such wires were dangerous to touch. The plaintiff's intestate was killed by an electric shock from one of such wires while upon a truss of the bridge preparing to dive into the stream. It was held that the evidence was sufficient to prove the negligence of the defendant in the erection of its wires.
2. **DEGREE OF CARE REQUIRED OF COMPANY ERECTING WIRES ON BRIDGE.**—In determining the precautions to be used to protect human life, the defendant was bound to consider all the uses to which the bridge was customarily put. The plaintiff's intestate was rightfully on the truss of the bridge and it was the duty of the defendant to not unnecessarily expose him to dangers which reasonable care could have avoided. In failing to properly insulate the wires, to string them beyond the reach of anyone standing on any part of the bridge, and to notify the users of the bridge of the danger, the company was guilty of negligence.

Appeal by defendant from judgment for plaintiff. Decided March 4, 1903; reported 75 Conn. 548, 54 Atl. 303.

Seymour C. Loomis and Earnest C. Simpson, for appellant.

Charles S. Hamilton, for appellee.

Opinion by **BALDWIN, J.:**

In 1887 the town of Branford built a highway bridge over the Branford river, with a draw. It was a truss bridge, with a railing on each side. On the westerly side of it, outside the railing, was a platform, with steps leading down to a small landing for boats, which was eight feet below the roadway. Ever since the construc-

tion of this bridge the boys and young men in the neighborhood had been, with the knowledge of the selectmen, in the custom of bathing from it in summer, and, while so doing of running and exercising themselves upon and jumping and diving from all parts of the bridge and draw; the smaller boys confining themselves to the landing, platform, and floor, but the larger ones diving and jumping from the railings and trusses. In 1896 the defendant constructed a line of wires for electric lighting purposes along the highway, and bolted one of its poles to the piles of the bridge at each side of the draw. An iron pipe was attached to each pole, through which the wires were carried down to the bottom of the river and across the bottom. In the summer of 1900, in lieu of this arrangement of the wires, overhead wires were strung between these poles, which could be detached and removed whenever a vessel passed through the draw. These ran over 14 feet above the floor of the bridge, and that nearest the west edge of it was about 5 feet 5 inches above the peak of the truss and 17 inches west of its west face. The selectmen inspected the defendant's line in 1896, and approved it. They were not consulted as to the change of construction made in 1900, and it did not appear that they approved it. The use of the bridge for bathing purposes continued thereafter as before, with their knowledge and that of the defendant. The wires above the draw were insulated so as to protect them against the weather, but not so as to make personal contact with them safe. The current was turned on every day towards dark, and then they were dangerous to handle. No notice of such danger was given by the defendant, although it knew that the bridge had so much iron upon it as to be a good conductor of electricity, and that the current was liable to diversion if one standing on the bridge should touch the wire overhead, particularly if he were wet at the time. In July, 1901, at about a quarter before 7 in the evening, the plaintiff's intestate, a boy of 16, who had been in the water, while bathing from the bridge, walked up the west truss, clothed only in bathing trunks, to the peak, which was over 17 feet above the river, and asked some boys below if they thought he would touch bottom if he dove from there. He then faced about to the west, and—

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whether voluntarily or instinctively to prevent a fall did not appear—caught hold of the nearest of the overhead wires, and was killed almost instantaneously by an electric shock. He knew that the wire was an electric light wire, and that a boy had received a shock a year before, while climbing the nearest of the poles for the purpose of diving, but it did not appear that he knew that the wires were dangerous to handle.

The Superior Court has found that the defendant failed to prove that it was not negligent in running the overhead wire as it did, with no greater precautions against danger to bathers, and failed also to prove that the boy was guilty of contributory negligence. There is nothing in the facts specially found inconsistent with these conclusions. The defendant was bound to a very high degree of care in the use for its own purposes of a highway bridge. *McAdam v. Central Ry. & E. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445, 447, 35 Atl. 341. In determining what precautions against danger to human life were reasonably necessary, it was bound to consider all the uses to which the bridge was customarily put. It is found that it was convenient to the defendant to have the wires no higher above the truss; but convenience in such a matter is a subordinate consideration. The bridge, as part of a public highway, was open to general public use. Under the law of this State the purposes of a highway are not regarded as wholly restricted to serving the right of passage. He who is standing on one as a mere sightseer, to gratify his curiosity, is rightfully there. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 36, 33 Atl. 533. The custom of boys to dive from the bridge was known to the defendant. The selectmen, who represented the town which owned it, had known of this practice for 14 years. So far as appears, they had expressed no disapproval. Silence for so long a time might naturally be taken as importing acquiescence. It was for them, and not for the defendant, to determine how the town property should be used. As far as the defendant is concerned, the plaintiff's intestate was rightfully on the truss, and the defendant owed him the duty of not unnecessarily exposing him to dangers to life which reasonable care on its part could avoid. It could have insulated the wires

more effectively. It could have strung them out of the reach of one standing on any part of the bridge. It could have carried them across the river, as it originally did, in a pipe laid on the bottom of the river. It could have put up a notice of danger. The trial court had the right to take into view what the company had not done as well as what it had done in determining whether it had fulfilled its burden under the default, of disapproving the charge of negligence.

The default also threw upon it the burden of proving its claim that the plaintiff's intestate was not himself in the exercise of due care. There were circumstances indicating that he was lacking in this. There was no proof of any justifying cause for his grasping the wire, and it was in proof that he grasped it at a time of the day when he had reason to apprehend that the current might have been turned on. But, while he knew the purpose which the wire served, it was not shown that he knew that there was danger in touching it. It was encased in a preparation of cotton fibre and paint. Had the casing been rubber or gutta percha, the danger from contact with it would have been slight. A boy of his age is not necessarily chargeable with knowledge of the different modes of insulation and their comparative effect. That he had knowledge that the casing contained a wire, and that an electric light wire, did not, as matter of law or of logical necessity, show that he was not in the exercise of due care, under the circumstances of his situation. It was to be and was considered by the trial court, but it was not absolutely controlling.

The only proof on the point of damages was that the intestate was a bright, active, intelligent boy of 16, 5 feet 2 inches high, who for nearly 3 years had been a general clerk in a village grocery, and driver of the delivery wagon. This was not insufficient to uphold the award of \$5,000. It is true that, since this amount is, under our statute, the extreme limit of recovery in an action for a wrong resulting in the death of the injured party, the plaintiff thus receives all that could be given for the loss of the most valuable life. It is also true that the life of this lad cannot be considered as possessing any extraordinary value. He had, however, a long

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expectation of life. While his earnings for the next four or five years would belong to his father, he had reason to expect to be able to earn thereafter, for a considerable period, much more than the cost of his personal support. What damage resulted from the loss of his earning capacity it was for the Superior Court to measure, as best it could, and there is nothing in the case which can be said, as matter of law, to require a lower estimate. *Broughel v. Southern New Eng. Telephone Co.*, 73 Conn. 614, 620, 48 Atl. 753, 84 Am. St. Rep. 139. While no evidence was offered, from tables of mortality or otherwise, of the boy's expectation of life, none in a trial to the court was needed, for judicial notice could be taken of the probability which such tables disclose. 17 Amer. & Eng. Ency. of Law, tit. "Judicial Notice," p. 900. It is to be presumed, in support of the judgment, that the court found that his net earnings annually after he would have come of age would have exceeded the amount of the interest which could probably during the same period be obtained on \$5,000; for otherwise the judgment would amount to an annuity, equivalent to such earnings, in perpetuity. It is also to be presumed that due allowance was made for the anticipation of these earnings by force of a judgment which was payable immediately. The evidence, which has been included in the record under the provisions of Gen. St. 1902, sec. 797, discloses no cause for correcting the finding, in any of the particulars requested by the appellant.

The superintendent of the defendant company, having been qualified as an expert, testified in chief that he constructed its line, and had the pole at the side of the draw nearest to the point where the boy was killed bolted to the piling of the bridge. He was then asked his reason for doing so, rather than for setting it out in the stream. Objection being made, the reason was claimed as tending to show that it was put in a proper place; but the court excluded the evidence. The duty which the defendant owed, in constructing its line, to regard the safety of those using the bridge for bathing purposes, required it to use reasonable care to select a proper location for this pole. The witness should, therefore, have been allowed to state the reason which governed its action in that respect. The record of the evidence, however, shows that immediately after this

ruling of the court the witness was asked whether, on the day of the injury to the plaintiff's intestate, the entire line was in all respects properly constructed, and gave an affirmative answer. Under Gen. St. 1902, sec. 797, it is proper for us to examine the whole record in disposing of this assignment of error, and the question and answer thus admitted are found in the statement of the evidence, though not in the special finding of the court. In view of that answer, no substantial harm can have been done by the exclusion of the preceding question.

The same witness, having testified in chief that the cross-arm on the pole above described was 15 feet lower than that on the pole standing next in the line on the same side of the draw, and that this was done to lessen the strain on the former and the risk of the falling of the wires in a high wind, was asked on cross-examination as to what would have been the expense of putting in an intermediate pole to reduce the strain, and then elevating the wires across the draw, and replied that it would have cost about \$60. The objection to this cross-examination was properly overruled. The defendant was not an insurer of the safety of those undertaking to walk up the truss. It was not bound to guard it at any cost. It was bound to guard it within reasonable limits, and in determining those limits the expense of adopting another mode of stringing the wires was a legitimate subject of consideration.

Another expert was introduced by the defendant, who had inspected the line over the bridge in 1902. The defendant claimed that it was then in the same condition as at the time of the accident, except as to one small section. As a preliminary to showing by him that it was properly constructed as it stood in 1901, he was asked to describe it as it was when he saw it, except as to the particular section which it was admitted had been changed. The court excluded this inquiry, and did not exceed the limits of its discretion in so doing. The evidence sought was remote in character; corroborative at best; and the same object could have been attained by a hypothetical question, based on the testimony of those witnesses who had described the arrangement of the line in 1901.

There is no error. The other judges concurred.

CONSOLIDATED ELECTRIC LIGHT & POWER CO. v. HEALY ET UX.*Kansas; Supreme Court.*

1. **ATTRACTIVE NUISANCE.**—It is the law of this State that one who maintains on his premises what is called an “attractive nuisance” (that is, a place which, though patently dangerous to those of ordinary knowledge and prudence, is so enticing to others excusably lacking in intelligence and caution as to induce them to venture to it) is liable for resulting injuries to the latter; and the same rule applies to one who maintains on his own premises a dangerous instrumentality, not in itself attractive, but placed in such immediate proximity to an attractive situation on the premises of another as to form with it a dangerous whole, notwithstanding the attractive situation on the other premises may not be of itself dangerous.
2. **ELECTRIC WIRES ON CITY VIADUCT; DEFECTIVE INSULATION.**—An electric company laid its wires on the viaduct of a city street, outside but close to the traveled way, between which wires and way was a railing or balustrade, over which small boys were in the habit of climbing and getting close to the wires. The wires were defectively insulated, of which fact and of the habit of the boys the company had knowledge. One of the boys, when in the act of climbing, was killed by coming in contact with the uninsulated wires. *Held*, the company is liable.
(Syllabus by the Court.)

Error by defendant from judgment for plaintiffs.

Decided December 6, 1902; reported 65 Kan. 798, 70 Pac. 884.

Kagy & Horn and *Hutchings & Keplinger*, for plaintiff in error.

Getty, Hutchings & Dean, for defendants in error.

Opinion by DOSTER, C. J.:

The Consolidated Electric Light & Power Company was given permission by the city of Kansas City to carry its electric wires on a viaduct constituting a part of one of the streets. This the company did by stringing them on timbers projecting out from the side of the viaduct or bridge. There were a number of wires placed at distances of about a foot to several feet from the ends of the boards constituting the floor of the bridge. The sides of the bridge

were guarded by an iron railing or balustrade, several feet high, running, substantially speaking, over the ends of the boards constituting the bridge floor. However, many of the boards projected beyond (that is, outside) the bridge railing. The electric wires alongside the viaduct were very defectively insulated. Their insulating covers had rotted away in many places. This fact the company knew. Small boys were in the habit of climbing over the viaduct railing immediately by the electric wires. This fact the company also knew. Holly Healy, a boy about 10 years old, and of the average intelligence and characteristics of boys of that age, climbed over the railing, and came in contact with one of the electrically charged wires, and was killed. It is probable that the moment before he had been standing, or, rather, moving about, on the projecting ends of the bridge boards or the projecting wire supports. Suit was brought by his parents to recover damages for his death. Judgment went in their favor in the court below, to reverse which error has been prosecuted to this court.

The matter principally discussed is the question of the company's liability under the circumstances stated. As to the boy, who was not at the time on the highway proper, but who was engaged in a dangerous sport immediately outside of it, was the company negligent in maintaining its wires in an uninsulated condition, where he was liable to come in contact with them? To our minds, there can be no doubt as to the answer. It was liable. To an adult it might not have been. To a small boy, in the buoyancy of sport, and lacking the intelligence and discretion of older years, it was liable, in view of the fact that it knew that children of his class were in the habit of venturing in dangerous proximity to its negligently kept wires. The place where the boy met his death was one of those denominated in the books "attractive nuisances," the keepers of which, according to those decisions which we regard as the sounder exposition of the law, are liable to one who, without inculpating fault on his part, is injured thereby. It is true, the company did not maintain the bridge and the railing and the elevation above ground, constituting an attractive climbing place for

boys, and it may be that its wires were not themselves attractive playthings for the boys, but it maintained them in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment. It identified itself in that way with the attractive place. If one maintains a dangerous instrumentality on his own premises, immediately against the premises of another, and within the sphere of the attractive influence of something on the latter, and a third one, venturing on the latter, is injured by coming in contact with the former, he would seem entitled to a recovery; that is, assuming the necessary knowledge to charge the derelict party. The electric company had knowledge in this case. Its counsel attempt to explain that it had not. But it had. We have gone carefully through the evidence, and are convinced. The principle applicable to this case has been several times declared in this state. It was done in the recent cases of *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625, and *Biggs v. Barb Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655. The subject has been thoughtfully considered in the second edition of Thompson on Negligence (vol. 1), under the head of "Injuries to Children from Defects in Premises," beginning with section 1024.

It is immaterial that the viaduct railing and its elevation above ground may not have been dangerous. They probably were, but for reasons peculiar to themselves. The boy did not come to his death because of dangers incident to the mere act of climbing. Nor is it material that the company's wires were not attractive. The attractions of the viaduct railing as a place for sport, and the defectively insulated wires, as instrumentalities of danger, were united together as a whole. We assume that the city is not liable, but, if it were charged with liability, it would be no answer to it to say it did not furnish the element of danger. It would be sufficient to reply that it furnished the attraction to entice into danger. When the company answers that it did not furnish the attraction, it is sufficient to reply that it furnished the danger to combine with the attraction. It could have neutralized the harmful

ingredient of attractiveness in the compound by guarding against the danger, and to require it to do so is not to impose upon it any greater burden than though it were responsible for both the hurtful constituents.

Other claims of error were made, particularly as to instructions, but none of them were well founded, and the judgment of the court below is therefore affirmed. All the justices concurring.

PART VI

**INJURIES TO PERSONS AND PROPERTY CAUSED BY
DEFECTIVE INSULATION AND ELECTRICAL
APPLIANCES IN AND OVER BUILDINGS
AND PRIVATE LANDS.**

(553)

CONTACT WITH LIVE WIRES ATTACHED TO BUILDINGS.

WALTERS V. DENVER CONSOLIDATED ELECTRIC LIGHT CO.

Colorado; Court of Appeals.

1. INJURY FROM CONTACT WITH WIRE FASTENED ON HOUSE; PRESUMPTION OF NEGLIGENCE.—The plaintiff, a boy of twelve years of age, was severely injured by a shock received from touching a defectively insulated electric wire fastened on a building within easy reach from a window. It was held that the facts were sufficient to make it a presumptive case of negligence against the defendant.
2. CONTRIBUTORY NEGLIGENCE.—The question as to whether or not the plaintiff was negligent in reaching out the window and attempting to replace the glass insulator, which had fallen from its bracket, is for the jury.
3. NEGLIGENCE IN PERMITTING WIRE TO BE UNINSULATED.—Whether or not the wire in question was uninsulated at the time of the accident, or whether the defendant was guilty of negligence in permitting such condition is a question of fact for the jury. An instruction to the jury was based upon the theory that defendant was relieved from all care as to the uninsulated wire except as to persons having some duty or business to perform at the exposed point is erroneous. It was the duty of the defendant to exercise reasonable care under all the circumstances to have and maintain the wire at this place in a reasonably safe condition.

Appeal by plaintiff from judgment for defendant. Decided March 10, 1902; reported (Colo. App.), 68 Pac. 117.

R. T. McNeal and Wells & Taylor, for appellants.

Wolcott & Vaile and William W. Field, for appellee.

Opinion by GUNTER, J.:

Verdict was for defendant, and from the judgment thereon is this appeal. At a former trial defendant objected to the introduction of testimony, upon the ground that the complaint herein did not state facts sufficient to constitute a cause of action. This

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objection was sustained, and judgment of dismissal entered. This was reversed. *Walters v. Light Co.*, 7 Am. Electl. Cas. 515, 12 Colo. App. 145, 54 Pac. 960. The pleadings herein are the same as on the former appeal.

1. The wires of defendant used in illuminating the residence of plaintiff's father ran to insulators "A" and "B" on iron brackets affixed to the rear wall of the residence; thence to a transformer; thence into the residence. The transformer and insulators were situate about 14 inches beneath the bath room window. At a point on the main wire just before it reached insulator A a union was made between the main wire and the wire leading to the transformer, and to effect this the original insulation was removed from the main wire and transformer wire at the point of union. After the wires were spliced at this point they were soldered together, and to reinsulate them insulating tape should have been wrapped around the point of union. There was evidence from which it might be reasonably concluded that at this point, for the distance of about 1 1-2 inches, the wire was exposed at the time of the accident, and about 2 inches of insulating tape unwound and hanging down. Plaintiff, aged between 12 and 13 years, looked out of the bath room window about 6:30 in the morning, and, seeing glass insulator A off the bracket, reached down, took hold of, and replaced it. As he did so a shock was received, producing the injuries, damages for which are sought to be recovered herein. Immediately thereafter he was found unconscious, his hand upon, or close to, the uninsulated section of the wire mentioned. There was evidence sufficient to go to the jury that a section of the wire was uninsulated at the time of the accident; that thereby plaintiff sustained the injuries complained of. If the jury believed these facts it made a presumptive case of negligence against defendant. In *Light Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, plaintiff was traveling a public alley. He came in contact with one of defendant's wires charged with electricity, which wire had become detached from its overhead fastening, and was hanging to within about two feet of the ground. As result of such contact plaintiff received a severe shock, and was

seriously injured. He had judgment below. The court, speaking to an alleged error of the trial court in instructing upon what constituted *prima facie* negligence, said:

"In substance, the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had become disconnected or detached from its fastenings, and hung down in a public alley, so as to endanger public travel, that, of itself, was *prima facie* evidence of negligence on the part of defendant. Strictly speaking, except in some relations springing out of contract, the mere happening of an accident is not any evidence of negligence. *Thomp. Carr.* p. 209, sec. 9. But in some cases of tort it has been held that the existence of certain facts, unexplained, is some evidence of negligence. *Thomas v. Telegraph Co.*, 100 Mass. 156, and *Haynes v. Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, are cases in point, and are authority for the instruction given in this case."

In *Haynes v. Gas Co.*, *supra*, a boy aged about 10 years took hold of a wire on the sidewalk over which he was passing, and was killed by an electric current. *Inter alia* the court said:

"Proof that there was a 'live' wire (carrying a deadly current) down into the highway surely raises presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant, and was its property, and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this 'live' wire was in the street through no fault of its servants and agents."

In *Tramway Co. v. Reid*, 4 Am. Electl. Cas. 382, 4 Colo. App. 53, 35 Pac. 269, the court said:

"The fact being established that injuries were caused by electricity, and that the car was so charged with the fluid as to injure a person by contact with any part of it, if not establishing negligence *per se*, made such a *prima facie* case as to require defense, either to show that the injuries were not caused by that agency or through the careless use of the agent."

See, also, *Railway Co. v. Cooper*, 7 Am. Electl. Cas. 444, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592.

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2. It is contended that the evidence disclosed such contributory negligence as to bar a recovery. The complaint stated the facts fully and distinctly. There was evidence to support its allegations. The court's holding in *Walters v. Light Co.*, *supra*, that the complaint stated a cause of action, and that the question of contributory negligence should have been submitted to the jury, in effect decided this contention. It is there said:

"The question of negligence is a mixed one of law and fact, and, except in rare cases, its determination belongs to the jury. . . . Where, upon facts in its possession, the character of the conduct is in any degree involved in doubt, it is never proper for the court to withdraw the question of negligence from the jury. . . . He (plaintiff) was rightfully in his father's house, and he was rightfully at the window. Seeing something out of place which was attached to the house, directly under the window, and within his reach, it might very naturally occur to him to replace it, and his act in so doing, if he had no knowledge of the purpose of the attachment, and no reason to apprehend danger from it, could hardly be called recklessness."

3. As it was the plaintiff's right to have his case submitted to the jury, it was also his right to have this done under proper instructions. The gist of the charge of plaintiff was that defendant, through negligence, permitted the wire in question to be in an uninsulated condition. It was for the jury to determine whether or not the wire was uninsulated at the time of the accident, and, if so uninsulated, whether the defendant was guilty of negligence in permitting such condition. A material factor in determining the degree of care which defendant should bestow by proper inspection and otherwise in maintaining the wire in a reasonably safe condition was the location of the wire in question. If located at a point readily accessible, the law would require greater care of defendant to preserve the wire insulated than if the wire was located at an inaccessible point. In *Walters v. Light Co.*, *supra*, it is said:

"We may concede that at places where there is no apparent possibility of injury ensuing from electric wires it would not be negligence to leave them uncovered, and that no duty to keep them insulated would exist unless it was imposed by some express law. But by this concession the question whether, consistently with the degree of care exacted in the management of an agency so dangerous as electricity, it was or was not the duty of defendant to have its wires insulated at the particular place where this injury occurred, is by

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no means disposed of. . . . The insulator was a harmless looking object; there was nothing to give notice of the deadly force hidden in the wire; the accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly affixed, and in which there were children, or persons ignorant of the purpose of the appliances, or the nature of the electric fluid. . . .

A part of instruction No. 8 was:

"And the court instructs the jury that the only matter which can be considered by the jury as bearing upon the question as to whether or not the defendant was negligent is the condition of the wire with which Clifton Wood Walters came in contact, and the condition of the insulation upon that wire at the time Clifton Wood Walters was injured."

A part of instruction No. 9 was:

"And although you may believe, from the evidence, that the defendant was negligent in placing these wires and transformer or converter at the place where they were fastened to the walls of the house, . . . still such negligence, if any there was, cannot be considered by you in this case, and must not influence your verdict in any manner whatever."

The effect of these two instructions was to tell the jury that it could not consider the location of the transformer in determining the degree of care that should be exercised in preserving the wire in question uninsulated. As stated, the location was a material factor in determining the degree of care to be exercised by defendant in maintaining the wire in question in a reasonably safe condition, and for such purpose it should have been considered by the jury. The giving of these two instructions, we think, constitutes reversible error. Instruction No. 18 in effect told the jury to find the issues for defendant. Such instruction is:

"The court instructs the jury that if they believe from the evidence that the defendant knew, or ought to have known, that the insulation upon the wire in question was defective and out of repair, still the plaintiff cannot recover in this case unless you further believe from the evidence that under all the circumstances proven in this case the defendant, exercising reasonable care, would have or ought to have anticipated that some person might have some duty or business to perform at the point where the insulation upon the wire was defective during the night and before the hour in the morning when the electricity was turned off from the wires in question, and might, while exercising ordinary care to prevent injury to himself, and while performing such duty and business, come in contact with such wire."

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This instruction absolved the defendant from all care as to the uninsulated wire except as to persons having some duty or business to perform at the exposed point. It was not claimed that the plaintiff (a child) had any duty or business to perform at such point. The jury, obeying the charge, could not do otherwise than find for defendant. Such instruction is not the law.

"The accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly affixed, and in which there were children, . . . and we cannot say, as a matter of law, that proof would not be admissible under the averments of the complaint, which would justify a verdict that in leaving the wire exposed as alleged the defendant was guilty of negligence." *Walters v. Light Co., supra.*

The defendant owed to this plaintiff the duty of exercising reasonable care under all the circumstances to have and to maintain this wire in a reasonably safe condition. If it failed in this duty, and the plaintiff was free of contributory negligence, liability attached.

There is no sufficient reason for prolonging this opinion to consider the many other errors assigned. The questions thereby presented will probably not arise on a second trial, if one be had. There was sufficient evidence of defendant's negligence for the question to go to the jury. The degree of care exacted of the defendant in operating its plant is settled:

"The highest degree of care which skill and foresight can attain consistent with the practical conduct of its business under the known methods and the present state of the particular art." *Light Co. v. Simpson, supra; Tramway Co. v. Reid, supra.*

The question of contributory negligence upon the facts herein should go to the jury. This, in effect, was also ruled upon the former appeal. These two questions of negligence and contributory negligence should have gone to the jury under proper instructions. They were not so submitted.

4. The ruling herein disposes also of Levina E. Waters against the Denver Consolidated Electric Light Company, as it is con-

trolled by the same facts and submitted upon the same abstract and briefs.

Cases reversed. Reversed.

Insulation of wires attached to buildings.—If an electric wire is attached to a building at a place where it may be easily reached by those lawfully in or about the building, the company erecting such wire is held accountable for the maintenance thereof in a safe condition commensurate with the dangers connected therewith, and the likelihood of persons being injured by contact. See *Giraudi v. Elec. Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114; *Griffin v. United Elec. L. Co.*, 6 Am. Electl. Cas. 252, 163 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477. In the case of *Giraudi v. Elec. Imp. Co.* the trial court was sustained in refusing to instruct the jury "with reference to the use of the agencies of nature, such as fire, steam, gas or electricity, the court instructs you that persons employing such agencies and introducing them into cities in the form of commodities for the public use, while held to a considerable degree of care in the service of these dangerous elements, are not required to use such extraordinary care as, while it would render the element absolutely harmless under all conditions, would also render its use impracticable. The public who receive the benefits of the convenience and comfort from the supply of the commodity are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The duties of the person supplying the commodity and of the public using it are reciprocal. It may depend upon the exercise by the other of such ordinary knowledge of the character of the commodity and such common prudence in its presence, as the circumstances of the time and place require."

In the case of *Keefe v. Narragansett Elec. L. Co.*, 21 R. I. 575, 43 Atl. 542, 4 Am. Neg. Rep. 218, a company was held not responsible where a girl climbed out of the window of a house and from there to the jet of an adjoining house, where she was injured by contact with electric light wires, since it was unreasonable to require the company to anticipate such action.

Cumberland, Mayor of, v. Lottig.

CUMBERLAND, MAYOR OF, v. LOTTIG.

Maryland, Court of Appeals.

1. INJURY TO CHILD BY CONTACT WITH ELECTRIC WIRE ON ROOF; CONTRIBUTORY NEGLIGENCE.—The plaintiff, a child of the age of six or eight years, while on the roof of a house under the charge of his mother in the night time, for the purpose of watching a play or burlesque which was being given in a theater across the street, was injured by contact with an electric wire running along the roof of the house. It appeared that the mother knew of the existence of the wire and had warned the other children with her against it. It was held that the defendant was not liable, that it could not be required to remedy a defect in a wire at a place where it had no reason to believe it would ever be touched; that under the facts in the case there was contributory negligence precluding a recovery.

Appeal by defendant from judgment for plaintiff. Decided April 1, 1902; reported 95 Md. 52, 51 Atl. 841.

Albert A. Doub, James A. McHenry and Daniel W. Doub, for appellant.

Richd. T. Semmes and John G. Wilson, for appellee.

Opinion by FOWLER, J.:

This is an action to recover damages for injury resulting from contact with an electric wire which was maintained by the city of Cumberland along and over the cornice of the roof of a house in that city occupied by the mother of the plaintiff. There was a verdict in favor of the plaintiff for \$4,000, and the defendant has appealed.

The questions to be considered arise on exceptions to the rulings on instructions given the jury, and also on an exception taken by the defendant to the remarks of the learned judge below while delivering an oral opinion upon the prayers which counsel for the respective parties had submitted for his consideration. It appears from the evidence in the case that the plaintiff is a lad six or eight years old, and that he lived with his mother and stepfather in the city of Cumberland, on the south side of Little Frederick street,

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opposite the south side of the city hall, the second story of which was used as a theater, or so-called "Academy of Music." On the night the plaintiff was injured his mother borrowed a stepladder from a neighbor, and by means of it she was able to reach "the trap door" in the roof, and in this way she got out upon the roof, taking with her the plaintiff. Several persons had preceded the plaintiff and his mother, all having reached the roof by the same means of egress. It appears from the evidence that they all (seven in number, the plaintiff and his mother included) went upon the roof for the purpose of looking into and through the windows of the theater to witness the play or burlesque which was being given there that night. Mrs. Mansfield, the mother of the plaintiff, testified as follows:

"I live in Cumberland, on the south side of Little Frederick street, which separates my house from the city hall building, in a rented house. It is a two-story house and the roof can only be reached by a stepladder. The roof is not perfectly flat, but slants very little, and is covered with tin, and is connected with the ground by a sheet-iron pipe. The injury occurred on the 25th day of August, 1898, between 8 and 9 o'clock at night. It was not a very dark night, but I do not think it was moonlight. There was an arc light in front of the house on a pole, but could not say how close to the house. One wire was across the top of the house and another along the house. The one across the top of the house extended between two poles, and was high enough above the roof for the boy to reach it lying on his stomach. I was sitting on a chair, and he was lying in front at my feet. There was a rug and a carpet between me and the roof. There was seven in all present. The girls went up ahead of me, and Arthur wanted to go, and he would not go unless I did. They took a chair up, and some carpet with them. The chair was for me to sit on. I was hardly seated until the girls reached out and touched the wire. I told them not to touch them, as we did not know what they were, and just then he touched it. I hardly had the words out of my mouth and I knew what it was. I grabbed him, and the wire flew from his hands. If I had not been there, nothing would of saved him, because the balance all run. There was flames, and he was burned on the left hand, right elbow, and both knees, and his body on his right arm was burned through the jacket. I was looking at the play in the Academy of Music from the roof. This was in August, in warm weather. The Academy of Music is on the second floor on the level with the top of our house. It was the night the Academy was opened, and the show was a burlesque. I was not there long enough to see anything, because just as I got there the boy was burned. The girls were looking at the play. They were there first. I took Arthur up with me, as well as the other one. We climbed up the step-

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ladder, and went right up and across the roof. I was a good deal further back than they were. They were at my feet, lying down. I borrowed the stepladder that evening from Mr. Brown, and my daughter brought it up there. I have lived in the property since last April, one year ago, and for 15 years before I lived across the street. I lived altogether upstairs. There is four rooms and a kitchen in the house. The porch is part of our house. I had never been up there before, but the girls took Arthur up there before without me. The wires were there before we moved in, and there never was a wire put there after we moved in. We had only been in then from spring until August when the accident happened. As I went up I took the boy with me, and as I sat down Miss Peterman touched the wire, and I told her not to touch the wire, because we did not know what it was. Just then he took hold of it, and as he took hold of it I knew what was wrong right away from the flashes that flew. The minute I saw it I ran and grabbed him. The flashes were terrible. It brightened up everything around it. The flame was three or four feet from the edge of the roof where the boy was lying. The girls was closer to the edge of the roof. The boys were further back. The wire was over his head. It was as far up as he could reach. I was at his feet. They were lying on rugs and carpets. As the girls let go, Arthur touched it. Whether they pulled it down I could not say. As I spoke of it, he took hold of the part that was not covered. I did not know the wire was there until I went up there. I knew the wires were dangerous, and told them that."

John Mansfield, the stepfather of plaintiff, testified that he looked at the wire next morning after the accident; that it was about 18 inches off the roof before the defendant caused it to be raised; that it was about four feet inside the edge of the roof, but afterwards said he judged it might be about 18 inches from that point. This witness was inside the theater looking at the play, and therefore saw nothing of the accident. Martin Murphy, another witness for the plaintiff, and related to his mother by marriage, testified that he was a lineman, and was engaged in putting up electric wires, etc.; that he went upon the roof to examine the wire. But the view we have formed by the case makes it unnecessary to consider his or any of the other testimony not relating directly to the accident itself. Mrs. Mansfield and the plaintiff are the only witnesses in the case whose testimony describes the accident. The testimony of the latter is very brief. It is as follows:

"I remember the night I was on the roof and the hurt. I am six years old. . . . I was lying on the roof on my stomach. I touched the wire with my left hand, and I don't remember anything after that. It burned me."

We are all of opinion that this is a clear case of contributory negligence, and hence we are of opinion that the defendant's first prayer, asking the court to take the case from the jury, should have been granted. It appears from the testimony we have above recited that Mrs. Mansfield was living in the house in question as a tenant, and that the wire was in the same position when the accident happened that it was when she moved into the house, and just where it had always been. It did not run across the roof, but it was located from 3 or 4 feet to 18 inches from the outer edge of the cornice. The roof was not intended, nor had it ever been used, for any such purpose as the plaintiff and his mother and their friends were using it. The question as to whether Mrs. Mansfield and her son were rightfully or wrongfully on the roof is a matter of little consequence in this case, for, even if it could be conceded they were using the roof for a purpose for which it was intended, yet, in our opinion, the evidence shows a reckless disregard of danger, and that, too, of a danger which was fully appreciated. She knew the wires were dangerous, and so told her friends. But, whether she knew it or not, she was bound to know it. It is too late now, when everybody must be presumed to know the danger of handling electric wires, to say that any one in his right mind can be exculpated from the charge of reckless carelessness who would act as Mrs. Mansfield acted according to her own testimony. She either saw or could have seen the wires in time to have avoided placing or allowing her child to lie down immediately under the wire. According to her own testimony, her friend or friends on the roof with her reached out and touched the wire, and her son was near enough to imitate their foolish example.

Of course, we have not considered the question of negligence *vel non* on the part of the defendant, for that is conceded by its defense of the plaintiff's contributory negligence. In other words, the position of the defendant is substantially this:

"We deny we are guilty of negligence because one of our wires running along the edge of the cornice of your house happened to be defective, without our knowledge, at a point where we had no reason to believe you would ever go, especially at night, to look at a play across the street; but, if we were negligent, your own rashness is the proximate cause of your injury."

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The plaintiff cited and relied upon *Western Union Tel. Co. v. State*, 6 Am. Electl. Cas. 210, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464, and *Brown v. Illuminating Co.*, 7 Am. Electl. Cas. 576, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442. In the case first cited this court said:

"Now, the deceased at the time of the injury was upon a public highway at a spot where he had a right to be, and was going along it to his home in a lawful and proper manner. The sidewalks of the city are for the use of all persons who have occasion to pass along them, and while in the exercise of this unquestioned right are entitled to be protected and safe from all injury on account of dangerous obstructions."

And in *Brown's case, supra*, the facts were entirely different from those we have here. In that case it appeared that a boy 11 years old was sent upon a roof covering the front window of the store about three feet wide, which extended across the entire front of the building just below the second-story window. An open rain spout or gutter ran along the front edge of this roof, and discharged its contents by a down spout attached to the front of the building. The boy was directed by his employer to go upon the roof which covered the store window to clean it and the rain spout, and while thus engaged he came in contact with an electric wire, and was injured. This court said it was error to have taken this case from the jury, and that, outside of any contractual relations between the parties to the suit, the very nature of the business thus conducted by the electric company imposed upon it a legal duty to see that its wires, when strung where persons were liable to come in contact with them, were properly placed and insulated with reference to the safety of such persons, and that this was especially so in reference to a person who, in the exercise of a lawful occupation in a place where he had a legal right to be, was liable to be injured by contact with the wires. But these are very different cases from the one at bar. The defendant, as we have seen, never had any notice that the roof was going to be used in the manner and for the purpose for which it was used. Can it be said that the plaintiff and his mother, as was said of Nelson in *Western Union Tel. Co. v. State, supra*, were upon a public highway, or in a place the de-

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fendant supposed they would ever go, or that they were acting in a proper manner? Of course, if the plaintiff or a workman had gone upon the roof in the daytime to do some necessary and proper work, a different case would have been presented. As was pointed out, however, the wires were harmless during the day, and no injury could have possibly happened to any one working there during the usual hours. It certainly needs no authority to show that it is not proper to get on one's housetop and lie down in dangerous proximity to the edge of the cornice only a few feet below electric wires. Such conduct may not be a breach of the law, but clearly it was a most glaring act of negligence. Nor do we see how the views expressed by this court in *Brown's case, supra*, can possibly support the contention of the plaintiff in this case. The evidence of the infant plaintiff's mother showing, as we have said, that she recklessly and carelessly took him into a place of danger, there can be no recovery; because, if he was too young to know of the dangerous character of the wire, his mother's negligence must be imputed to him, and, if he was old enough to know better than to take hold of the wire, his own negligence would be fatal to his case.

In conclusion, a word in regard to the remaining exception,—that relating to the comments or oral opinion of the trial judge in the presence of the jury. Having disposed of the case by what we have already said, we do not deem it necessary to pass upon all the criticisms made upon the oral opinion delivered below. It is reproduced in the record, and we assume it to be correctly reported. We think the trial judge was in error when he told the jury that the right of the plaintiff to recover was not at all dependent upon how the roof was used by him and his mother; “that they might use it for any purpose, for even an unlawful or immoral purpose;” and “that their right to use it for any purpose cannot be questioned in this case.” From what we have already said, it will be seen we do not agree with those views. Again, the trial judge told the jury there was no evidence that the wire was pulled in. But Dr. Carpenter testified that Mrs. Mansfield told him that, if she had not got hold of the child, the wire would have dragged him off the roof,

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and that he could not have reached the wire if somebody had not pulled it to him. Marcellus Martin says Mrs. Mansfield stated that she did not see why in the world the rest did not get shocked, because they pulled down the wire to the boy, otherwise he could not have reached it. There is other evidence in the record tending to prove the same point, but what we have quoted is sufficient for the present purpose. It is difficult, we know, for the judge to remember all the evidence upon every disputed question of fact, and it is for this reason that the trial judge should be extremely cautious to avoid commenting upon the weight or the failure of evidence. In the recent case of *Coffin v. Brown* (decided at the October term, 1901; not yet officially reported), 50 Atl. 567, we said, Boyd, J., delivering the opinion:

"We are aware that it is sometimes difficult for the court to assign reasons for its rulings without saying something that may unintentionally affect the jury. But if a judge makes a statement which shows his opinion of a question of fact which the jury is to pass on, it is very apt to make an impression on some, if not all, of the jurors, and great care should be exercised to avoid it."

It follows that the judgment will be reversed.

Judgment reversed, without a new trial.

Injury to trespasser on private lands by contact with live wire.—In the case of *McCaughna v. Owosso & Corunna Elec. Co.*, 129 Mich. 407, 89 N. W. 73, the plaintiff's intestate was killed by contact with a guy wire used to sustain an electric light pole, which became charged with electricity from contact with an electric light wire. It appeared that such pole and guy wire was located upon premises used by a railroad company and devoted by it to railroad business. There was a notice erected upon the premises reading in substance: "Dangerous! The public is hereby warned not to trespass upon these grounds as this is not public property." The defendant, an electric light company, occupied the premises with its power house and with other necessary appliances for the transaction of its business. There was some evidence to the effect that teams were driven and that persons traveled on foot near the power house and the pole from which the guy wire was extended; but there was nothing in the record to disclose that it was a public way or to indicate an invitation to the public to enter on the grounds. The evidence indicated that the decedent and a companion, having with them two bottles of beer, for some reason sought this secluded spot on the evening in question. The manner in which the injury was received was not explained.

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except upon the theory that the decedent reached up and took hold of the wire and pulled it down, receiving the shock which caused his death. There was no evidence showing actual knowledge on the part of the officers of the company of the fact that the wire was a live wire. It was held that the evidence failed to show that the decedent was a traveller in a public way, and that the defendant owed no duty to the decedent of guarding the premises.

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Missouri; Supreme Court.

1. INJURY TO LABORER WORKING ON BUILDING FROM CONTACT WITH WIRE; DUTY AS TO INSULATION.—The plaintiff's intestate was a laborer engaged in hanging and taking down signs from buildings. He was injured, when thus employed, by contact with an electric wire. It was held that in the exercise of ordinary care and foresight the defendant should have known that sign hangers, painters and other mechanics would be required in the pursuit of their respective occupations to come in proximity to its wires erected on signs and cornices in front of the building where the accident occurred; it was its duty to use every possible protection to insulate its wires at such points; and if personal injuries resulted to a person lawfully engaged in the performance of his duties at such place, without negligence upon his part, the defendant was liable therefor.
2. PROOF OF DEFECTIVE INSULATION.—The fact of the death of the plaintiff's intestate from the contact with the wire is conclusive proof of defective insulation and of the negligence of the defendant; the question as to whether the plaintiff was guilty of contributory negligence or not is for the jury.
3. FAILURE OF PLAINTIFF TO PROTECT HIMSELF BY USE OF RUBBER GLOVES, ETC.—In instructing a jury as to the use of rubber gloves, boots and coat to prevent injury from contact with electric wires, it is proper to submit the question as to whether a person engaged as a sign hanger should properly take such precautions for his safety under the circumstances of the case.

Appeal by defendant from judgment for plaintiff. Decided March 17, 1903; reported 173 Mo. 654, 73 S. W. 654.

This is an action by plaintiff, who is the widow of Bernard Geismann, against defendant company, to recover \$5,000 damages for the negligent killing of her husband in the city of St. Louis on the 24th day of January, 1898. At the time of the accident the deceased was a laborer, engaged in

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hanging and removing signs. The defendant at that time was a lighting corporation, engaged in supplying electric light and electric power to consumers in the city of St. Louis. The deceased was an employe of a concern known as Schurk General Ironworks, in the capacity of laborer, and as such it was his duty to hang or remove signs in different parts of said city. He was sent by his employers, with other workmen, to remove a sign which was hanging in front of the store numbered 111 North Broadway, in said city, which was occupied by a tailor doing business under the name of "Brooks, the Tailor." The petition sets out several ordinances of the city of St. Louis regulating the placing of electric wires, etc., and then alleges their violation by defendant; but, as they were eliminated from the case by the ruling of the court, it is unnecessary to say more with respect to them. The case therefore rests on the subsequent averments of the petition of the defendant's negligence, which are that while the deceased, without negligence on his part, was, on the day mentioned, engaged, in the line of his duty, in removing the sign, "one of the loosened wires with which the sign had been attached to the building immediately over the front of said store came in contact with one of the said wires of defendant, upon which said wire the insulation had, through negligence and carelessness of the defendant, and in violation of the said ordinances and provisions aforesaid, been permitted to become out of repair and worn off to an extent that the dangerous and deadly electric current passing through the same had become exposed and dangerous to those required to be thereabout, and in consequence thereof the said Bernard Geismann received an electric shock from said exposed current, which caused him to lose consciousness, thereby precipitating him upon his head to the stone pavement, some fifteen feet below, and inflicting injuries by reason whereof he died on the 3d day of February, 1898; that said wire had, through the negligence of defendant, been permitted to become out of repair, and the insulation thereof to be worn off, and the dangerous current passing through the same to be exposed, for a long time prior to said 24th day of January, 1898, which facts defendant knew, or by the exercise of ordinary care on his part might have known, but that the said Bernard Geismann, owing to his inexperience with electric wires and currents, did not know, and by the exercise of ordinary care on his part could not have discovered." The answer admitted the defendant's corporate existence, and put in issue all the other allegations of the petition, and further stated (1) that the deceased did not receive a shock from an electric wire that caused him to fall; (2) that he was negligent in approaching the wires mentioned in the petition, because they were strung far above the reach of persons passing along the sidewalk, and, if said wires were bare of insulation, the deceased, by the exercise of ordinary care, could have known that fact, and he was therefore negligent in approaching the wires, for the purpose he did, without first assuring himself that the insulation thereof was in good condition; and (3) that he was guilty of negligence in approaching defendant's said wires, they being of the size and appearance of those usually employed to conduct electric currents of high tension and of dangerous character, and then handling other wire, without first providing

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himself with a coat, gloves, and foot gear of rubber. All the new matter of the answer was denied by the reply.

The facts as disclosed by the evidence are about as follows: Deceased was at the time of his injury 37 years of age, and was earning \$9 per week in putting up and taking down signs. He had a wife and four children who were dependent upon him for support. On the day of the accident, deceased and two other men were sent by his employer to take down a wooden-frame, canvas-covered sign, about 3 feet in width and 10 feet in length, and weighing 25 to 35 pounds. The sign was suspended about 22 feet from the sidewalk, and at the top of the first story of a building abutting on the public street. The back or lower part of the sign was nailed to the tailor's sign, and the front or upper side was supported by guy wires 15 to 18 feet long, which were attached to the building in the recesses on either side of the bay window. The front of the building was 26 feet in length, on a north and south line with a bay window about 8 feet wide, extending out about 2 feet 8 inches from the second story line. The sign in question had been taken off the building and replaced three or four times, and it had been up only four to six weeks when the deceased and his companions were sent to take it down. There was evidence that Schurk, deceased's employer, had repeatedly cautioned his men (among them, the deceased) to "take care of electric wires about their work," and that the deceased had worked about electric wires, in putting up and taking down signs, once or twice a week during the time he was in that employ. Corrigan, with whom the deceased had worked, did not know whether he knew the danger of electricity. They had never talked about the danger of electricity. It was a bright, dry day. Defendant introduced evidence tending to show that rubber gloves, coats, and boots were a safeguard to persons working about electric wires, and that the deceased had not provided himself with such clothing. The plaintiff's witnesses testified that sign hangers could hardly wear rubber coats, gloves, and boots at their work, and that such clothing was never worn by men engaged in their occupation. The defendant's high voltage electric lighting wires were strung along the iron cornice, above, behind, and beneath the sign which was to be removed, and the tailor's sign just below it. But the evidence tends to prove that when the deceased and his companions, Corrigan and Meyer, arrived at the building, Corrigan put a ladder against the front wall, about three feet from its south line, and "when the ladder touched the (tailor's) sign there was a little flash of electricity," and they moved it north eight or ten inches, "so the wire wouldn't ground." Corrigan called his fellow workmen's attention to that flash—told them to be careful. Then he and the deceased went up the ladder and loosened the south end of the sign. Meyer remained on the pavement to act as they lowered it to him. Meyer received the south end of the sign, it was let down on his shoulder, and Geismann and Corrigan went to the north side of the bay window to cut the guy wire—the remaining attachment of the sign. Each looked at the electric light wires on that side of and about the bay window, and "they appeared to be all right." Corrigan testified "that apparently the wires looked all right," and he said

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to Geismann, relative to the wire, "it appears to be all right." There was a recess on the cornice just north of the bay window, in which Corrigan and the deceased stood. It was two or three feet deep, and three men could stand there. Corrigan cut the guy wires north of the bay window, and handed them instantly to the deceased, while Meyer held the sign below. Geismann had almost no weight to support—only to keep the sign from toppling till Corrigan could go down the ladder to the sidewalk. As Corrigan turned to go down the ladder, deceased cried, "Oh!" which attracted his attention, and he turned back toward Geismann and saw a little spark, and Geismann was falling. Corrigan saw the flash, and thought the loose end of the wire in Geismann's hand came in contact with the defendant's electric wire. Meyer saw the spark as Geismann cried, and he thought it came from the loose end of Geismann's wire touching defendant's electric wire. The deceased fell to the pavement, alongside of and eight inches from the ladder, and he could have caught it by reaching out his hand as he went down. He made no effort, whatever, to catch anything to save himself. He was about ten feet from the north line of the building when he fell, and he had stopped slightly, and back and forth two feet from the cornice, holding the north guy rope, one end of which was attached to the disconnected sign, and about seven or eight feet of the loose end of which was above his hands. The deceased fell to the sidewalk, and sustained a severe fracture of the skull. A clot of blood formed on his brain, and he died nine days later without regaining consciousness. It appears that he had an abundance of room, and did not need to hold to the building to retain his balance, and he had nothing in his hands except the guy wire. This guy wire held by Geismann could not have touched the defendant's wire at the point where the ladder was first put up, and the sparks flashed from the wire. That was about fifteen feet from where Geismann stood when he was shocked, and it was around on the opposite side of the bay window. Besides, the loose wire extended only about seven or eight feet beyond his hands. The hands of the deceased were very hard and they were contracted—drawn up and clenched—after the accident, as if he were trying to hold something, and he had a wire scar on the inside base of the fingers of his left hand. An electric shock would cause contraction of the muscles, and the burn would show a white, charred appearance. "The skin would be dry and white. A white line would be such as I would expect to find on the hand from grasping a wire carrying electricity." The evidence is conflicting as to the number of defendant's wires that were on and about this first story cornice on January 24, 1898. Schurk and Corrigan both testified that they examined the place after Geismann's death, and that there was an electric wire back of the sign and extending to the building north, that the model used in evidence did not show. It was also conflicting as to the condition of the wires, and the amount of repairing that was done on them immediately after the shock to Geismann. Corrigan testified for plaintiff that "the electric wire behind the sign looked like a secondhand wire to me. Q. You have seen enough electric light wires to be able to tell? A. I have seen enough to know the wires." O'Reilly, super-

visor of city lighting, called by the defendant, testified as follows as to the placing of the wires on top of and behind the signs in question. "The whole general plan of bringing wires into buildings and bringing them behind signs at all is improper construction. That is not the proper way to construct wires of that character." And he further stated as to his examination of those wires: "I say I found the electric wires in fairly good condition for wires that are placed on signs. You know they are not put in in the manner usual for constructing electric wires. They were placed behind this sign on the tailor shop. For wires of that kind they were in fairly good condition. It is very difficult to keep wires of that kind in good condition." The wires had been up for some time.

It appears that when Corrigan and Geismann went up on the cornice the insulation was off the wire in two places near the south line of the building, but the wires appeared all right on the north side—north of the bay window. It also appeared that the wires were in such condition four months prior to this accident, that Louis Scherd, while engaged in taking down the same sign, saw places on the south side of the building where the insulation was off these wires, and he received a shock caused by the wire supporting the sign getting around the electric light wire on the north side of the bay window—the side on which Geismann was shocked. He described the character of construction of that wire as follows: "Mr. Scherd, will you point out to the jury where the insulation was off that you saw? A. Right here. This is the iron here. That holds the back of the (tailor's) sign up. There are three of them, one at each end—about three or four feet from the end—and one in the center. This wire has been a kind of slack, loose, and has been rubbing on this iron here. The wind made it rub on this wire, and that is how the insulation came off."

Just after the accident to Geismann, six or seven electric light men appeared, and they worked along the defendant's wires and tapped two places in front of the building. J. F. Evans testified to the tapping of two places.

At the request of plaintiff, and over the objection of defendant, the court instructed the jury as follows:

"(1) The court instructs the jury that if they find from the evidence that on the 24th day of January, 1898, the deceased, Bernard Geismann, was, in the line of his duty as a laborer or sign hanger, engaged in removing a sign at premises No. 111 North Broadway, in the city of St. Louis; and if you further find that while so engaged, and without fault or negligence on his part, the wires with which said sign had been attached, if any, came in contact with the wires of defendant through which an electric current was then passing; and if you further find that the insulation, if any, on said wire, had become out of repair and worn off to an extent to expose the electric current, if any, passing through the same; and if you further find that the defendant knew, or by the exercise of ordinary care on its part could have known, that said insulation, if any, had become out of repair and worn off, if you find that it was out of repair and worn off, and that the said deceased did not know, or by the exercise of ordinary care could not have discovered,

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it; and if you further find that because of the exposure, if any, of the electric current passing through said wire, the said deceased received an electric shock and lost his consciousness; and if you further find that by reason thereof he was precipitated upon his head to the stone pavement below, and sustained such injuries, if any, that as a direct result thereof he died on the 3d day of February following—then you will find a verdict for the plaintiff.

“(2) The court instructs the jury that it was the duty of the defendant to so insulate or protect the wire in question as to make it reasonably safe to those who may be brought in contact with it, and if they should find that the deceased, Bernard Geismann, came in contact with said wire of the defendant; and if you find that defendant failed to so insulate or protect the said wire as to make it reasonably safe to those who may be brought in contact with it; and if you further find that by reason of the failure, if any, to insulate said wire, the said deceased received an electric shock, without any negligence on his part; and if you further find that by reason of such shock, if any, the said deceased lost consciousness, and fell to the ground below and was injured; and if you find that he died as the direct result of such injuries, if any—then you will find a verdict for the plaintiff.

“(3) The court instructs the jury that if they believe from the evidence that the said wire at the place where deceased was standing at the time he received his injuries, if any, had all the appearances of having been properly insulated, that this was then an invitation or inducement to said deceased to risk the consequences of contact with the same in the performance of his work in lowering the sign in question.

“(4) The court instructs the jury that if at the time of and immediately preceding the injury, if any, to the deceased, Bernard Geismann, he was in the exercise of such care as ordinarily careful and prudent persons usually exercise under the same or similar circumstances, then he was not guilty of contributory negligence.

“(5) The court instructs the jury that, if you find for the plaintiff, you may, in your verdict, give her such damages, not exceeding five thousand dollars, as you may deem fair and just, under the evidence in the case with reference to the necessary injury resulting to her from the death of her husband.”

The defendant, upon his part, prayed the court to instruct the jury as follows.

“(2) If the jury believe from the evidence that plaintiff's deceased husband and the defendant were both guilty of negligence which directly contributed to the injury, then the verdict should be for the defendant.

“(3) If the jury believe from the evidence that the injuries to plaintiff's husband resulted from an accident, the true cause of which the jury cannot determine from the evidence, then the verdict should be for the defendant.”

“(9) The court instructs the jury that there is no evidence before them in regard to the ordinances pleaded, or the acceptance thereof, and the jury will disregard them entirely.”

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Which request the court granted, and gave the instructions.

Defendant further asked the court to give the following instructions:

"(4) The jury are instructed that the charge of negligence made by plaintiff against defendant by this action must be proved to the satisfaction of the jury by plaintiff, by a preponderance of the evidence. The jury have no right to presume negligence, and, if the evidence does not preponderate in favor of plaintiff, then the verdict should be for the defendant.

"(5) The jury are instructed that if they believe from the evidence that plaintiff's husband was an experienced sign hanger, and experienced in taking down signs in St. Louis, and knew of the danger of coming in contact with electric light and other wires in the city of St. Louis, and that he either saw an electric flash from defendant's wire some time before he went upon the cornice from which he fell, or was told thereof by his fellow worker, and cautioned against the danger therefrom, and thereafter, from his own carelessness in handling uninsulated wires, permitted them, or either of them, to come in contact with defendant's wire, then the verdict should be for the defendant.

"(6) The court instructs the jury that it was the duty of Bernard Geismann, plaintiff's deceased husband, to exercise ordinary care upon his own part to avoid injury from any wire he was handling coming into contact with defendant's wire; and if the jury believe from the evidence that he knew, or if in the exercise of ordinary care in his vocation he would have known, his liability to injury from defendant's wire, and that the wearing of rubber coat, boots, and gloves, or either of them, would have lessened his peril; and if the jury believe from the evidence that the wearing of some or all of these articles would have been a reasonable and proper precaution for him to take for his own safety, and the failure of said Geismann to wear some or all of those articles contributed to his injury—then the jury will find for the defendant.

"(7) The court instructs the jury if they believe from the evidence that plaintiff's husband, Bernard Geismann, knew, or by the exercise of ordinary care could have discovered, his liability to injury from defendant's wire, it was his duty to use what would be reasonable care under the circumstances to avoid injury therefrom; and if the jury believe from the evidence that he failed to exercise reasonable care under the circumstances, and that his failure to use reasonable care contributed to his injury, then the verdict should be for the defendant.

"(8) The jury are instructed that if they believe from the evidence that plaintiff's husband was a man of ordinary intelligence, and experience in putting up and taking down signs in the city of St. Louis, and knew, or by the exercise of ordinary care would have known, of the danger resulting from contact of uninsulated wire with a wire of high electric power, and that defendant's wire was in plain sight, and was seen by plaintiff's husband, or that he would have seen it if he had been exercising ordinary care for his own safety, and that he, under those circumstances, negligently allowed an unin-

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ulated wire in his own hands to be drawn across or come in contact with defendant's said wire, then the verdict should be for the defendant."

"(10) The court instructs the jury that, under the pleadings and the evidence in this case, they should find for the defendant."

Which instructions the court refused, to which refusal of the instructions thus prayed the defendant, by its counsel, then and there duly accepted.

The court of its own motion gave the following instructions, having modified instructions offered by defendant so as to read as follows:

"(4) The jury are instructed that, to entitle plaintiff to recover, the charge of negligence made by plaintiff against defendant by this action must be proved to the satisfaction of the jury by plaintiff by a preponderance of the evidence. The jury have no right to presume negligence, and, if the evidence does not preponderate in favor of plaintiff, then the verdict should be for the defendant. By the term 'preponderance of evidence' is meant the greater weight of the evidences; and, in determining the greater weight of the evidence, the jury should not simply consider the number of witnesses adduced by either side, but should also consider the credibility of the witnesses, and all the facts and circumstances proven in the case.

"(5) The jury are instructed that if they believe from the evidence that plaintiff's husband was an experienced sign hanger, and experienced in taking down signs in St. Louis, and knew of the danger of coming in contact with electric light and other wires in the city of St. Louis, and that he either saw an electric flash from defendant's wire some time before he went upon the cornice from which he fell, or was told thereof by his fellow worker, and cautioned against the danger therefrom, and thereafter, from his own carelessness in handling uninsulated wires, permitted them, or either of them, to come in contact with defendant's wire, whereby the alleged shock resulted, then the verdict should be for the defendant.

"(6) The court instructs the jury that it was the duty of Bernard Geismann, plaintiff's deceased husband, to exercise ordinary care upon his own part to avoid injury from any wire he was handling coming into contact with defendant's wire, and if the jury believe from the evidence that he knew, or if in the exercise of ordinary care in his vocation he would have known, his liability to injury from defendant's wire, and that the wearing of rubber coat, boots, and gloves, or either of them, would have lessened his peril; and if the jury believe from the evidence that the wearing of some or all of these articles would have been a reasonable and proper precaution for him to take for his own safety under the circumstances, and in his situation as sign hanger, and that the failure by said Geismann to wear some or all of those articles directly contributed to his injury—then the jury will find for the defendant.

"(7) The court instructs the jury if they believe from the evidence that plaintiff's husband, Bernard Geismann, knew, or by the exercise of ordinary care could have discovered, his liability to injury from defendant's wire, it was his duty to use what would be reasonable care under the circumstances

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to avoid injury therefrom; and if the jury believe from the evidence that he failed to exercise reasonable care under the circumstances, and that his failure to use reasonable care contributed directly to his injury, then the verdict should be for the defendant.

"(8) The jury are instructed that if they believe from the evidence that plaintiff's husband was a man of ordinary intelligence, and experience in putting up and taking down signs in the city of St. Louis, and knew, or by the exercise of ordinary care would have known, of the danger resulting from contact of uninsulated wire with a defective or noninsulated wire of high electric power, and that defendant's wire was at some point or points not properly insulated, and was in plain sight, and was seen by plaintiff's husband, or that he would have seen it if he had been exercising ordinary care for his own safety, and that he, under those circumstances, negligently allowed an uninsulated wire in his own hands to be drawn across or come in contact with defendant's said wire, then the verdict should be for the defendant."

To the giving of which instructions the defendant duly excepted at the time.

Under the instructions of the court, the jury rendered a verdict for the plaintiff for the sum of \$5,000. In due time defendant moved to set the verdict aside and for a new trial, which being overruled, the company brings the case to this court by appeal for review.

Albert Blair and Gilliam & Smith, for appellant.

L. Frank Ottofy and Jesse A. McDonald, for respondent.

Opinion by BURGESS, J. (after stating the facts):

The petition upon which the case was tried is bottomed upon common-law negligence, setting forth specifically the acts constituting such negligence, and clearly states a cause of action. Defendant says that the evidence shows clearly that the deceased was guilty of contributory negligence, and for that reason its demurrer to the evidence should have been sustained; but we are of the opinion that the evidence as disclosed by the record, without again stating the facts in detail, was sufficient to take the case to the jury, and that the demurrer thereto was properly overruled.

The first instruction given in behalf of plaintiff is criticised upon the ground that

"It is too general, in that it does not specify that the defendant was negligent in not remedying the defect after it had notice, or a reasonable time

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had elapsed after the insulation became out of repair and worn off to notice, but the mere fact of its being out of repair and worn off makes the defendant liable, and does not restrict the injury of deceased to a wire in his hand coming in contact with defendant's wire where insulation was out of repair and worn off; nor does it consider the defense that it was by the act of Geismann and his associates that the wire had been burned, the insulation deteriorated and burnt off."

Electricity is one of the most dangerous agencies ever discovered by human science, and, owing to that fact, it was the duty of the electric light company to use every protection which was accessible to insulate its wires at all points where people have the right to go, and to use the utmost care to keep them so; and for personal injuries to a person in a place where he has a right to be, without negligence upon his part contributing directly thereto, it is liable in damages. *McLaughlin v. Louisville Electric Light Co.*, 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. The deceased was, at the time he received the shock which caused his death, in a place where his duty required him to be; and it was the duty of the defendant, in the exercise of even ordinary care and foresight, to know that sign hangers, painters, carpenters, and other mechanics would be required, as occasion might require of them in the pursuit of their respective occupations, to come in proximity to its wires constructed and maintained on the signs and cornice in front of the building where the accident occurred. As was said in *Overall v. Louisville Electric Light Company* (Ky.), 7 Am. Electl. Cas. 521, 471 S. W. 442:

"Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be; and it was the duty of the electric light company to know that linemen of the telephone company would have to come in close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages."

The duty of the defendant in the maintenance of its wires under circumstances very similar is well presented in *Clements*

v. Electric Light Co., 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348:

"The wire of the defendant was spliced, and was not insulated as required by the ordinance. It passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who by their occupation were brought in close proximity to them. In this respect and in this particular case we are of the opinion that the defendant's negligence caused the death of Clements. But notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, he cannot recover. The question is whether the act of the party injured has a necessary tendency to expose him directly to the danger which resulted in the injury complained of. If the plaintiff could, by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury. When the action of both parties must have concurred to have produced the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. This proof need not be direct, but may be inferred from the circumstances of the case. The deceased (Clements) was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and, to all appearance, were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact, there was an invitation or inducement held out to Clements to risk the consequences of contact. He had the right to believe they were safe, and that the company had complied with its duty specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of the defendant. . . . Clements' attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admission to him was only of a danger which he knew to exist. . . . before he advised him to be cautious of going near the wires or to keep away from them. . . . The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden

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and silent. But they are disarmed of danger if properly insulated. By looking one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence for coming in contact with it, unless he does it unnecessarily and without proper precautions for his safety. It cannot be said that, when Clements went on the roof to repair it, he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless."

So in *Griffin v. Electric Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477, a tin-smith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric light wire running along the side of the building, about 12 feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire where the insulating material had been worn off; and it was held that the question of defendant's negligence and the due care on the part of the plaintiff were for the jury, and that it could not be said, as a matter of law, that the condition of the wire was so apparent that the plaintiff must or ought to have seen it, although the accident happened in the forenoon, and that, while an expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury.

Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in cases referred to the actions were grounded in negligence in using improper insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be. The same principle governs here. Although the wires of the defendant com-

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pany were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great as, if not greater than, if the danger had been from insufficiency or want of insulation. The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact therewith. The law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury. As announcing the same doctrine, we refer to *Newark Electric Light & Power Co. v. Garden*, 6 Am. Electl. Cas. 275, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725; *Illingsworth v. Light Co.*, 5 Am. Electl. Cas. 312, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379; *Perham v. Portland General Electric Light Co.*, 7 Am. Electl. Cas. 487, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730, *Giraudi v. Improvement Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Haynes v. Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786.

It follows from these authorities that it was defendant's duty, in the first place, to use every protection which was reasonably accessible to insulate its wires at the point of contact or injury in this case, and to use the utmost care to keep them so; and the fact of the death of Geismann is conclusive proof of the defect of the insulation, and negligence of the defendant; and as to whether he was guilty of contributory negligence, or not, was a question for the jury.

Instruction No. 2 given in behalf of plaintiff is said to be erroneous "because it 'ejects' a duty in the case for the defendant to protect the wire"—a duty not alleged in the pleadings—and makes it incumbent on defendant to keep it reasonably safe. The allegations of the petition are broad enough to justify the instruction, which is in accordance with what we have said, with the exception of the duty of defendant to keep its wire in-

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sulated so that those in the discharge of their duties might not be injured by coming in contact with it, and in this respect more favorable to defendant than the law authorizes, in that it only requires that its wire be kept reasonably safe.

Plaintiff's third instruction is also said to be erroneous, in that it tells the jury that, if the wire where deceased was standing had all the appearance of being properly insulated, this was an invitation or inducement to him to risk contact with it. While this instruction simply announces an abstract proposition of law, it is in accordance with what is said *arguendo* in *Clements v. Electric Light Co.*; *Newark Electric Light Company v. Garden*, 6 Am. Electl. Cas. 275, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725; *Perham v. Portland Electric Co.*, 7 Am. Electl. Cas. 487, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; and *McLaughlin v. Louisville Electric Light Company*, *supra*. But as it does not purport to cover the entire case and authorize a recovery, the judgment should not be reversed upon that ground alone, for, when considered in connection with all the instructions in the case, as it should be, it is, we think, nonprejudicial.

The fifth instruction given on the part of plaintiff is said to be erroneous upon the ground that it fails to state to the jury the proper grounds on which to base plaintiff's damages. No instruction was asked by defendant on this feature of the case. An instruction couched in substantially the same language was approved by this court in *Browning v. Railroad*, 124 Mo. 55, 27 S. W. 644, with respect to which it was said:

"The defendant asked no instruction on the measure of damages, whatever. No attempt was made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope; and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations, in an instruction embodying its view. The court is not required, in a civil case, to instruct on all questions, whether suggested or not; and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal."

So in *Barth v. K. C. Elevated Ry. Co.*, 142 Mo. 535, 44 S. W. 778, following the *Browning case*, an instruction in almost exactly the same language as the one given in this case was approved; the court holding that the generality of the instruction would not constitute reversible error, as the right was reserved to defendant to point out the elements limiting the damages in its own instructions.

No error was committed in modifying the sixth and eighth instructions asked by defendant, as by so doing the jury could not have been misled, or defendant prejudiced thereby.

Nor is there merit in the contention that the verdict is excessive or the result of passion or prejudice. There is nothing disclosed by the record indicative of either. The verdict met with the approval of the court before whom the case was tried, and will not, under the circumstances, be disturbed by us upon either of these grounds.

The weight of the evidence was for the consideration of the jury under the instructions of the court, which covered every phase of the case, and are free from objection.

It was not necessary, in order to plaintiff's recovery, to prove that at the exact point where the contact occurred the insulation was off the wire. If the defective insulation caused the injury without fault on the part of plaintiff, as he had the right to be where he was at the time of the injury, that was sufficient. There were two wires — one behind the sign and below the top of it, while the one that caused the injury was strung in the space between the sign and cornice, along the top of the sign, and level with the cornice.

The verdict is well supported by the evidence, and the record free from substantial error. The judgment should be affirmed. It is so ordered. All of this division concur.

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FITZGERALD V. EDISON ELECTRIC ILLUMINATING CO.

Pennsylvania; Supreme Court.

1. **DEFECTIVE INSULATION.**—The plaintiff's intestate was engaged in painting a cornice upon a house. In the performance of his duties he found certain wires of the defendant in his way and proceeded to prop them up so that he could work under them. In so doing, he grasped an uninsulated wire which caused his death. It appeared from the evidence that the defendant company, in extending its wire across the corner of the building, permitted it to sag against the cornice, and in this way some of the insulating material was worn off and the wire became dangerous. It was held sufficient to impute negligence to the defendant and to justify a verdict in favor of the plaintiff.

Appeal by defendant from judgment in favor of plaintiff. Decided October 12, 1903; reported 56 Atl. 350.

W. U. Hensel, H. M. North, and D. McMullen, for appellant.

B. F. Eshleman and W. F. Beyer, for appellee.

Opinion by POTTER, J.:

The court below charged, in part, as follows:

"The proof presented by the defendant is that there were three wires; that the wire nearest the building was a wire for the arc lamps, and there was no power in this wire except at night, and that in the daytime it was what was called a "dead wire;" that this wire was about one inch from the building, and that the next wire was away from the building about thirteen inches, and was a main feed wire for the alternating current; and that another wire, which was also a similar feed wire, was still farther away towards the west. It is therefore claimed that Fitzgerald could not have been injured by the wire which went over the corner or near the corner of the building, and which he propped up, and that it must have been by one of the wires which were away from the building, and that he himself was in fault in coming in contact with that wire. This, then, raises the question of fact for you to determine—whether or not he was guilty of contributory negligence.

"There has been considerable dispute in regard to the poles which carried the three wires. One of them, all agree, was located near Hartman's warehouse, at the corner of the alley which runs back of the railroad depot and meets North Christian street, and that from this pole the lines extended diagonally to a pole on East Chestnut street. The position of this last-mentioned pole is fixed at from thirty to sixty feet east of North Christian street, on East Chestnut street.

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"The man was killed by one of these wires. He was lawfully upon the roof in the exercise of his business. If it was convenient for him to get at the cornice in the way he did, he had a right to do so. If he found the wires in his way, and proceeded to prop them up so that he could work under them, he also had a right to do so, provided he did it in a proper way. Whether the means he took were such as a prudent man should have taken is a question for you to determine. If the weight of the wire which fell on him had been of itself, such as to knock him into the street, and the electric current had nothing to do with it, that would have been clearly his own negligence; but though he was bound to know, in general, the dangerous nature of such wires, and to use proportionate care in interfering with them, he was also entitled to presume, from the general custom, that they were properly insulated, unless the defect in their covering was visible to such an examination as he ought to have made. But, if, while he was acting as a prudent man should have acted, the wire fell upon him, and, to save himself, he, without fault, grasped an uninsulated wire, which caused his death—he being in peril, or thinking he was, and not having time nor opportunity properly to discriminate—he would not be guilty of contributory negligence on this account. How this accident happened is, however, under the facts proven, for this jury to ascertain."

Defendant presented these points:

"If the jury believe from all the evidence that the wire which Fitzgerald propped up was a dead wire, and that the live wire which caused his death was thirteen inches clear of the building, and that the said live wire did not interfere with his painting, but that, after the wire which was propped fell, he caught the live wire with his hand, thereby causing his death, there can be no recovery in the case, and the verdict must be for the defendant. Answer: This point cannot be affirmed as stated. We refer, for its answer, to our general charge, in which we have endeavored already to set forth the respective liabilities of the parties.

"The present use plaintiff in this suit is the administrator of Mrs. Fitzgerald, the widow, who died the 26th day of January, 1900. In this suit there can be no recovery except in her own immediate right; and, if the jury find for the plaintiff, they can assess only such damages as the widow, Mary P. Fitzgerald, suffered by reason of the loss of her husband from the time of his death to the time of her death, a period of four years and four and a half months. Answer: We answer this by saying, while it was proper to bring this suit in the name of the widow, and her administrator is properly substituted, we cannot affirm the part of the point which restricts the assessment of damages to the time of her death. The suit was, in accordance with the law, brought by her for the use of herself and her minor child. But if this contention would be correct, all rights of the minor to participate in it would be practically taken away, so far as the time after her death is concerned, for there can be but one suit to ascertain the damages occasioned by reason of decedent's death."

We do not see that this case could properly have been taken from the jury. Its determination turned upon disputed questions of fact. There was evidence tending to show that the defendant company extended its wire across the corner of a building, and so close as to permit of its sagging against the cornice, and that in this way some of the insulating material was worn off, making the wire dangerous. No reason appeared for thus trenching upon private property, as the wire was not seemingly used to convey current to those premises. But if it had been used for that purpose, prudence would have required the wire to be stayed or fastened so that the insulation should not be rubbed off. Nor was it shown that the accident was caused by anything else than the dangerous wire. In this respect this case differs from *Elliot v. Allegheny County Light Company*, 8 Am. Electl. Cas. —, 204 Pa. 568, 54 Atl. 278, cited by appellant. It clearly appeared in that case that the plaintiff fell from some cause entirely unconnected with the presence of the wire, and that he came in contact with the wire only in the course of his fall. In the present case it was at least a disputed question as to whether or not the accident was caused by the deceased coming directly in contact with the live wire. This question, as well as that of the contributory negligence of the deceased, was, we think, properly left to the jury, and they have found those questions in favor of the plaintiff.

The 1st, 2d, 3d, 4th and 5th assignments of error are in violation of Rule 31 of this court, in that there is no reference to the page of the paper book where the matter referred to may be found in its regular order in the printed evidence.

We do not feel that the extracts from the charge, which are made the subject of the 6th and 7th assignments of error, contain anything which can fairly be held to unduly increase the burden upon the defendant company. When read in connection with the context in each instance, they are unexceptional.

As to the form of action, this suit was properly brought by the widow in her own behalf and that of her son, they being the only parties entitled to recover. If the widow had lived until the suit was concluded, the sum recovered would have been divided be-

tween her and the child, as in case of the death intestate of the husband and father. If she had lived until after the judgment was obtained, but had died before it was paid, certainly her administrator would have been entitled to take the share coming to her. As she died during the pendency of the litigation, we can see no good reason why her administrator was not properly substituted to maintain the action in her behalf.

The question as to who should be substituted as plaintiff upon the death of the widow under the circumstances such as these is of no practical importance. The interest of the child in the proceeds remains, and can only properly be paid to its guardian.

The suit might have been carried to completion by the next friend or guardian of the minor. But in any event, the proportions in which the sum recovered is to be shared between the child and the estate of the mother is a matter for consideration and adjustment between those representing them, respectively, and does not concern the defendant company.

The assignments of error are overruled, and the judgment is affirmed.

Injuries to Laborers on Buildings by Electric Shock.

1. Liability of electric company; general rule.
2. Knowledge of danger.
3. Necessity of going into proximity with dangerous wires.
4. Right to rely on apparent safety.
5. Evidence of negligence.
6. Injury to trespasser.
7. Remote and proximate cause.

1. Liability of electric company; general rule.—The general rule applicable in all cases where electric wires are erected in places where persons in the exercise of their lawful rights are likely to come in contact with them, that such wires be maintained in a condition of perfect insulation, applies without material qualification to wires extended over and along buildings so placed as to interfere with laborers engaged in the performance of duties upon such buildings. See notes on pages — — *ante*. The determining question as to the liability of an electric company for the maintenance of wires over and upon buildings seems to be as to whether or not the company should have anticipated the probability of persons coming in contact with such wires while working in and upon such buildings. In other words, under

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the rule as established in all the cases, the maintenance of an uninsulated wire charged with a deadly current of electricity at such a distance from the side of a building as to interfere with the making of needed repairs upon the building by the owner thereof, would be negligence and the company would be liable for the injuries occasioned by contact with such an uninsulated wire to any person rightfully engaged in the performance of duties in connection with such repairs.

2. Knowledge of danger.—The general knowledge of a workman that wires charged with an electric current are dangerous, especially electric light wires which require a comparatively large voltage, is not of itself sufficient to convict him of contributory negligence where he grasps such wire for the purpose of enabling him to proceed in the performance of his work upon the building. While an expert may consider it dangerous to touch any wire unless he knows it to be a harmless one, a man of ordinary intelligence would not necessarily know that an injury would result from contact with an electric light wire in an apparently perfect state of insulation. *Griffin v. United Electric Light Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477. See, also, *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 40 Pac. 108.

3. Necessity of going into proximity with dangerous wires.—The necessity of going to the place where electric wires are, need not be shown to avoid the charge of contributory negligence; convenience is enough. In the case of *Will v. Edison Elec. Ill. Co.*, 7 Am. Electl. Cas. 642, 200 Pa. St. 540, 50 Atl. 161, the plaintiff's intestate was injured by contact with an electric wire along the cornice of a building, while engaged in painting the roof. A non-suit was entered on the ground of the contributory negligence of the decedent. The Supreme Court reversed the court below and held that the question of contributory negligence should have been left to the jury. In so doing the court said. "He, the plaintiff, was lawfully upon the roof in the exercise of his business. It is said that there was no evidence that it was necessary for him to go on the roof to do the painting. No such evidence was required. His convenience was reason enough. It was convenient for him to get at the cornice in that way, and he had the right to do so. He found the wires in his way, and proceeded to prop them up so that he could work under them. Whether the means he took were such as a prudent man should have taken is not so clear that it can be determined by the court. If the weight of the wire, when it fell on him, had been such as to knock him into the street, that would have been so clearly his own negligence that the court could have said so as matter of law. But, though he was bound to know, in general, the dangerous nature of such wires, and to use proportionate care in interfering with them, he was also entitled to presume from the general custom, that they were properly insulated, unless the defect in their covering was visible to such examination as he ought to have made. All these considerations entered into the question of his negligence and made it one for the jury;" and in the case of *Consolidated Gas Co. v. Brooks* (N. J. Law), 53 Atl. 296, it appeared that the plaintiff's decedent while engaged in

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painting a gutter on the edge of one of the balconies on the house of his employer, came in contact with an electric wire which ran up the side of the house some eight or ten inches from the corner of the balcony and received a shock therefrom which instantly killed him. The court held that the mere fact that a servant while engaged in painting such gutter came in contact with the wire was not in itself conclusive evidence of contributory negligence, and that the court would not be justified in directing a verdict for the defendant, an electric light company, on the ground that there was no evidence from which a jury could conclude that it was neglectful of any duty, although no one saw the accident, and there was no testimony to show how it occurred.

4. Right to rely on apparent safety.—In the case of *Olements v. Louisiana Elec. L. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 So. 51, the plaintiff's son was a tin roofer engaged in the repair of the roof of a gallery and was killed by coming in contact with the electric light wire running over such roof, at a height of about two feet and four inches above the roof. To all appearances the wire was in good condition although it had been worn by exposure to the weather and had evidently lost some of its insulating properties. The shock was received by his attempt to step over the wires. The rule was laid down in this case that a person whose occupation brings him in proximity to the company's wires has a right to believe that the wires have been insulated and an ordinance relating to the insulation of splices has been complied with. He is required to look for patent defects in the insulation only. If not aware of a latent defect, he comes in contact with the wire, and is injured without fault on his part, the company is responsible. In this connection the court said: "The wires were visible, and to all appearances were safe. The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearances of having been properly insulated. From this fact there was an invitation or inducement held out to the decedent to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent defects. Had he known of the defective insulation and put himself in contact with the wire, he would have assumed the risk. The defect was hidden and the insulation wrapping was defective. It is certain, had it been properly wrapped, that the decedent would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of the defendants." See also *McLaughlin v. Louisville Elec. Light Co.*, 18 Ky. Law Rep. 693, 37 S. W. 851.

5. Evidence of negligence.—Evidence that wires stretched over the roof of a building were improperly insulated; that the insulation had worn off in five places from the wires hanging below the converter of the wall of the building; that at one point there was a bad splice entirely uninsulated, and that the defective insulations were old, was held sufficient to make out a

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prima facie case of negligence. *Ennis v. Gray*, 5 Am. Electl. Cas. 325, 87 Hun (N. Y.), 355, 34 N. Y. Supp. 379.

6. Injury to trespasser.—Where a boy goes upon the roof of a coal shed belonging to the defendant without his permission to get a ball which had been thrown there, and comes in contact with an uninsulated electric light wire running along the roof, resulting in his death, the defendant was held not liable for the injury. The court said: "If the plaintiff's intestate was not a trespasser, which we do not decide, he was at most a mere licensee, and so far as he was concerned the defendant had a right to arrange and use its property in any lawful manner, and owed him no duty with respect to it except to refrain from setting a trap for him and from doing him intentional or wanton harm. The live wire with which the deceased came in contact was a lawful apparatus, used in the ordinary business of the defendant, and was not designed as a trap." *Sullivan v. B. & A. E. E. Co.*, 156 Mass. 378, 31 N. E. 128.

7. Remote and proximate cause.—In the case of *Elliott v. Allegheny County L. Co.*, 204 Pa. St. 568, 54 Atl. 278, the plaintiff, while engaged as a painter, fell from or with a ladder that slipped from its proper position while he was using it. In the effort to save himself as he fell, he reached out and clutched at an electric light wire, which was supported from brackets at the side of the building and he was shocked and burned from the alleged defectively insulated condition of the wire. It was undisputed that the defendant was in nowise responsible for the slipping of the ladder which was the originating cause of the plaintiff's fall. The trial court gave binding instructions in favor of the defendant upon the ground that the proximate cause of the plaintiff's injuries was his fall from the ladder, and not his grasping of the wire in the line of the fall. These instructions were sustained upon appeal.

LIGHTNING ENTERING BUILDINGS OVER WIRES.**SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. MCTYER.***Alabama; Supreme Court.*

1. **INJURY CAUSED BY LIGHTNING ENTERING BUILDING OVER TELEPHONE WIRES WHERE THE INSTRUMENT HAD BEEN REMOVED; LIABILITY OF TELEPHONE COMPANY.**—It appeared that a merchant had caused the defendant to put a telephone in his store, and such telephone was subsequently taken out; when the telephone was removed the wires were left in the building, and were twisted together and remained hanging on the wall; the plaintiff came into the store of the merchant to make a purchase and while there a thunder storm came up and she took a seat near the place where the defendant's telephone wires were hanging from the wall; during the storm a bolt of lightning ran down the wires and struck the plaintiff, causing the injuries complained of. It was held that the permitting of the wires to remain in the condition they were, after the removal of the telephone instrument, so that atmospheric electricity striking such wires at any place might be inducted into the building and there discharged, to the peril of persons and property, was negligence on the part of the company. It was the creation and maintenance of a dangerous situation without that warranting occasion for it which may exist when the wires are in use, and the company is liable for whatever damages may result to persons and property rightfully on the premises.
2. **PERMITTING TELEPHONE WIRES TO REMAIN AFTER REMOVAL OF INSTRUMENT NEGLIGENCE PER SE.**—In view of the known capacity of electric telephone wires to collect and carry dangerous currents of atmospheric electricity, it is the plain duty of a telephone company when removing its instruments to also remove its wires; a remission of this duty is a positive wrong and is negligence *per se* to be so declared as matter of law. It being the duty of the company to remove such wires, it is no defense to an action for injuries resulting from their being negligently allowed to remain there, that the company did all that could be done to obviate the danger of their being there.

Appeal by defendant from judgment for plaintiff. Decided June 9, 1903; reported 137 Ala. 601, 34 So. 1020.

George H. Fearons, J. M. Falkener and Ray Rushton, for appellant.

Swanson & Clayton, for appellee.

Opinion by McCLELLAN, C. J.:

These may be said to be familiar facts in physics, and therefore within the common knowledge of mankind and within the judicial knowledge of courts: That atmospheric electricity, or lightning, is frequently discharged from clouds and passes to the earth; that metal wires strung in the air are good conductors of electricity, much better than the air; that animal bodies, the bodies of human beings among the rest, are also better conductors than the air or than wood; that electricity so discharged in the vicinity of such wires is liable and apt to pass into them and along them to their ends, and thence through the best conductor at hand into the earth; that, if a human body is in contact with the end of the wire, the current will pass through it to the ground, and that, though not in actual contact with the end of the wire whence the current must go to the ground, but near to it, the current, instead of passing through the air to the ground, will seek the better conductor of the body, pass through the air to it, and through it to the earth. Of course, the higher the wires extend, the nearer to the point of discharge in the air, the greater the likelihood that the current will pass into them, and, the greater the extent of the wires horizontally, the more danger there is of receiving and carrying such electric currents. It may also be said to be common knowledge that where two wires are strung near to each other, within a foot or two, on poles, through the air, after the manner of telephone and telegraph wires, there is a likelihood or liability that lightning, in its descent from the clouds, will strike and follow both of them to their ends, unless diverted by other more attractive conductors, and must necessarily then pass from them to the earth through the best conductor then in its general pathway.

The business of maintaining a telephone system by means of transmitters and receivers, and of poles extending many feet in the air with wires strung upon them, and extending, for the transmission of words, into houses, public and private, is recognized as a legitimate business. It is, too, a business of a public or *quasi*

public nature, in that those engaged in it in a town or city or given locality and using public streets and roads for their lines of poles and wires may be said to be under a duty to supply telephone service within such territory to all persons who desire it and pay for it, so that a system of lines and instruments established in a community in a sense meets a public demand and conserves public convenience. If, by the exercise of such reasonable precautions as a man of ordinary care and prudence would exercise in respect of such a dangerous agent, injuries to persons and property from the conduction along the wires and into houses of currents of atmospheric electricity may be avoided, it is the duty of companies engaged in this business to employ devices and appliances to that end. If the danger cannot be wholly avoided, due care should be taken to minimize it; and, if such care is taken, and there still inheres to the operation of the system a modicum of unavoidable peril to persons and property, its consequences are to be risked and submitted to in consideration of the conservation of public convenience to which they are necessarily incident—the business being a legitimate one, in other words, though involving peril to others, its prosecution with the care that a man of prudence would exercise in view of its character would not entail liability for injuries which may result notwithstanding the exercise of such due care. The operation of a railway is attended with danger to the people which cannot always be guarded against; but, being a legitimate business, and conducive to the convenience of the public, its operation is not wrongful; it is not a nuisance. But if a railway were constructed and maintained and operated for no good purpose, and subserved no proper end, it would be a nuisance, and its operators would be liable even for injuries unavoidably inflicted in its operation. And so—to take an example from our own decisions—the driving of cattle through a frequented thoroughfare may be attended with more or less danger to persons using it, but their owner has a right to drive them there in the prosecution of his business if he exercise due care to avoid injury to others, and exercising that care he will not be responsible if

injury results notwithstanding on the principle that "for the convenience of mankind in carrying on the affairs of life, people, as they go along public roads, must expect or put up with such mischief as reasonable care on the part of others cannot avoid." *Matson v. Maupin & Co.*, 75 Ala. 321, 315. But if a man, without occasion therefor, turn vicious animals into the street, or negligently allow them to be in a street, and injury results, he will be liable, though he be guilty of no wrong or negligence while they are in the street. And the reason is plain, and the same in both the instances given: The presence of the dangerous thing is not justified by any consideration of public good or convenience; its being there is itself a wrong. And so it is, and for the same reason, with lines of telephone wire. The only justification for their being carried into a building and maintained there is the telephone service thus supplied by means of them. If they are put there not for that purpose, but for the mere convenience of the telephone company, and allowed to be in such condition as that persons and property in the building are liable to be injured by lightning gathered and brought into the building by them and there discharged, their mere presence is a wrong. So, when they were originally carried into the building, and equipped and maintained to supply the service to the owner, but at his instance the service has been discontinued and the instruments removed, and the company, instead of then removing the wires, merely cuts them loose from the instrument, twists their ends together, and leaves them thus dangling in the building, so that atmospheric electricity striking them anywhere along their course on the outside will be inducted into the building, and there discharged to the peril of persons and property, this is an unpalliated wrong on the part of the company. It is the creation and maintenance of a dangerous situation without that warranting occasion for it which may exist when the wires are in use—without any occasion whatever, in fact; and the company is liable in damages for whatever injuries may result to persons and property rightfully on the premises.

The facts averred in the sixth count of the complaint bring the case at bar within the category last stated. The defendant had strung its wires for a mile or more to and into the storehouse of one Thomas, and had there attached them to a telephone instrument for the purpose of supplying him with its telephonic service, had supplied him for a time and until he made known to them that he did not desire the service longer, and requested the company to take out its instrument. This the company at once did, but against the suggestion, not to say protest, of Thomas, the defendant failed to take its wires out of the house, but, cutting them loose from the instrument, twisted their ends together, and left them hanging in the store. A mercantile business was being carried on in the place, and, of course, the public were invited, and were expected, and had the right to be in there to make purchases of Thomas' wares. In view of the known capacity of these wires to collect and carry dangerous currents of atmospheric electricity into the store and there discharge them, to the deadly peril of persons in there at the time, and in view of the total absence of any occasion for the wires to be left there at all, there can, in our opinion, be no doubt that the company owed a plain duty not only to Thomas, but also to his customers, to remove the wires, and thereby to obviate this peril to him and to them. Nor was there any excuse or palliation for its failure to perform this duty. Its remission of it was a positive wrong, committed by defendant's servant who removed the telephone and twisted up and left the wires. No man of ordinary care and prudence would have so acted. There is not room for two reasonable conclusions as to the character of the act in respect of negligence *vel non*. It was negligence *per se*, and to be so declared as matter of law. The sixth count of the complaint, therefore, though it does not in terms characterize this failure of plain duty on the part of the defendant as negligence, avers facts which constitute negligence. The duty was owed to the plaintiff on its averments. The negligence of it resulting in her injury is actionable by her. The negligence is alleged, and also her injury in consequence of it. The count suffi-

ciently stated a cause of action. The demurrer to it was properly overruled.

The averments of this count showing defendant's said duty, that it was a duty which defendant owed the plaintiff, and defendant's neglect to perform, were, considering the evidence adduced in connection with the facts to which we have adverted as being within the common knowledge of the court and jury, proved beyond controversy and adverse inference. So far as count 4 differed from count 6 in its averments, the proof failed to establish count 4, but did without conflict establish count 6; so that upon these points of difference—which were as to the number of wires running into the store and the occasion of plaintiff being there—the plaintiff was entitled to the affirmative charge under count 6, and it follows that, if the court erred in overruling the demurrer to count 4, the error was without injury to the defendant.

The demurrers to plea 2 were properly sustained. The defendant owed the duty to remove the wires not only to Thomas, but to Thomas' customers as well, and his mere consent that they might be left there was no defense to plaintiff's action.

It being defendant's duty to remove the wires, it is no defense to this action, sounding in damages for injuries resulting from their being negligently allowed to remain there, that defendant did all that could be done to obviate the danger of their being there. The court, therefore, did not err in sustaining demurrers to pleas 4 and 5.

The duty to the plaintiff being alleged and proved, as also defendant's failure to perform that duty, and the proof being without conflict, the only question for the jury, assuming that they believed the evidence as to the wires being left in the store under the circumstances detailed before them, was whether these wires inducted atmospheric electricity into the store and discharged the current upon the person of the plaintiff, and whether she was injured thereby. To say the least, the evidence was overwhelming, though not perhaps to the exclusion of all ground for a contrary inference, to the establishment of the injury and of the causal connection between the wrong and it. It follows that the court properly re-

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fused to give the general affirmative charge, and the affirmative charge on count 6 for the defendant. For reasons given hereinbefore in connection with what is said last above, the refusal of the affirmative charge on count 4 involved no injury to the defendant.

Having, as above declared, reached the conclusion that the plaintiff was entitled to the affirmative charge on the question of negligence, it is unnecessary to discuss the refusals of the court to give charges 4, 5, 6 and 7.

We find no ground for reversing the judgment in the record, and it is affirmed.

PHOENIX LIGHT & FUEL CO. v. BENNETT.

Arizona; Supreme Court.

1. **LOSS BY FIRE OCCASIONED BY LIGHTNING ENTERING A HOUSE OVER AN ELECTRIC LIGHT WIRE.**—An electric light company is not liable for a failure to insulate wires against electricity having its origin in the clouds or atmosphere. Although an electric lighting corporation is bound to exercise the highest degree of skill and care for the protection of life and property, its duty does not extend so far as to require insulation of its wires in a manner to protect against injurious consequences of a lightning stroke. Such consequences are by law ascribed to inevitable misfortune, or to "the act of God," and leaves the harm resulting from them to be borne by him upon whom it falls.

Appeal by defendant from a judgment in favor of plaintiff.
Decided October 31, 1903; reported 74 Pac. 48.

Chalmers & Wilkinson and *Herndon & Norris*, for appellant.

Alfred Franklin and *A. C. Baker*, for appellee.

Opinion by DAVIS, J.:

This is an appeal by the defendant company from a judgment rendered against it in an action for damages for alleged negli-

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gence, which, it was claimed, resulted in the destruction of the plaintiff's property. The complaint upon which the action was founded, after stating the residence of the parties and the corporate character of the defendant, alleged, "that, at all the times hereinafter mentioned, defendant was engaged in the business of supplying electricity, by virtue of a public franchise, to its certain consumers and patrons in and near the city of Phoenix, and of wiring and equipping the houses and buildings of its said patrons and consumers for the purposes of lighting such houses with electricity; that on or about the 1st day of April, 1899, the defendant, in changing the wires in the house of plaintiff on North Second avenue, near the city of Phoenix, negligently, wrongfully, and willfully caused the wire conducting electricity from its plant to plaintiff's house to be placed through the window casement of plaintiff's said house, without insulating the same in any manner whatsoever; that wholly by reason of said negligent placing of said wires as aforesaid, and without any knowledge, consent, or fault of plaintiff, said wire became charged with electricity on or about the 18th day of July, 1899, and set fire to and wholly destroyed plaintiff's said house, and furniture and effects of plaintiff therein, being of the value of five thousand dollars, to plaintiff's damage in the sum of five thousand dollars; that, at all the times herein mentioned, plaintiff was a purchaser and consumer, for hire, of the electricity furnished by defendant." A motion to require the plaintiff to make his complaint more definite and certain, by stating how and whence "said wire became charged with electricity," was denied, and a demurrer to the sufficiency of the complaint was overruled. The further answer of the defendant was a general denial of the allegations of the complaint, and upon the issues thus made the case was tried before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$3,404.50.

The evidence adduced on the trial showed the following facts: That the house of plaintiff at Phoenix, Ariz., was occupied by himself and family as a residence. It was an ordinary story and a half brick house, which he had built during the latter part of

the year 1896. At the time the house was built, it had been wired for the purpose of electric lighting by persons not connected with the defendant. That the first attachment with the defendant's plant was made at the front of the house, the wires entering through an upper window. The wiring remained in that condition for about two years. In the spring of 1899 the defendant changed its pole line to the alley back of the house, and then the wires connecting the defendant's plant with the plaintiff's house were changed to the back part of the house. The defendant placed its wires through the casement of a garret window at the rear end of the house in making the new connection. This change was without the knowledge of the plaintiff until some time after it had been made, but it appears never met with any protest from him. On the 18th day of July, 1899, about 9 o'clock in the evening, the house was burned, together with a large part of its contents. A thunderstorm had been prevailing on that evening. The plaintiff was just going to bed, when he noticed a glimmer on the stairway. He ran upstairs, and saw that there was a fire in the window casement on the south side of the window, which he made ineffectual efforts to extinguish. About two hours before this the electric lights were on in the plaintiff's house, and he was reading by the same. Suddenly the lights went out—"just popped off." The plaintiff went upstairs, examined the wires in the part of the house where the connection had been made by the defendant, and examined the entrance of the wire into the house to see if it had come apart. He observed the condition of the wire at that point, and the insulation. He found the wires connected. The junction with the house wiring was on the inside of the upper story. This part of the house was not completely floored. The wires entered the house through augur holes in the window casement. There were no crockery tubes or clay bushing where the wire penetrated the casement. In the unfloored space between the casement and the point at which it passed under the floor, there was 2 or 3 feet of slack in the wire. Plaintiff could not see that which passed through the casement, but such wire as was visible to him was in a damaged condition. It was frayed, and the insulation was

loose upon it. It was not held tight at the point of entrance. It was an old wire, and had been in that condition from the time it was put there. Plaintiff had previously noticed this wire, and the loose way in which it was fixed up, but never so closely as on this occasion. There were porcelain spools on the eaves of the house, from which the wires ran into the window, and similar insulators along the garret joists on the inside. There was no fuse box at the window. The plaintiff used lamplight after the electric lights went out, and resumed his reading downstairs. When he first saw the fire it was in the window casement, immediately surrounding the wires. The blaze was 2 1-2 feet in length, about 4 to 6 inches above the wires, and some distance below. The plaintiff was at the time hiring the use of electricity from the defendant for lighting purposes. On the morning after the fire the employees of the defendant took down the wires in the vicinity of the plaintiff's house, and found them to be in fairly good condition, except that they were burned for a distance of 12 or 14 feet from the building. The transformer, near by, which controlled the current to the plaintiff's house, was found to be uninjured. The usual and ordinary strength of this current was 104 volts. Evidence was introduced as to the value of the property. A number of witnesses also testified as to the condition of the night; that a severe electrical storm was raging, during which there was a peculiarly bright flash of lightning, followed by a heavy clap of thunder, shortly after which they noticed fire coming from the roof of plaintiff's house. There was expert testimony to the effect that electric light companies make no attempt to insulate their wires against lightning, and that it is not practicable to do so.

Numerous errors were assigned by the appellant, but those which we consider to be fully determinative of this appeal are predicated upon the instructions which were given to the jury. The *gravamen* of the complaint in this case was the defendant's failure to properly insulate the wire which it "placed through the window casement of plaintiff's house." The peculiar facts of the case afforded an unusual opportunity for theorizing upon the cause of this fire. It was a theory of the plaintiff that the rain blown

in at the augur holes of the window casement had wetted the wood work and wires, creating what is technically termed a "short circuit," and setting fire to the woodwork. The evidence cannot be said to sustain this theory, however, except upon the assumption that the voltage was greater than that of the ordinary current which passed over these wires from the defendant's plant for his lighting purposes. But the plaintiff contends that it was equally the duty of the defendant to so insulate these wires as to protect against an electrical current which might have been induced from the clouds or atmosphere. Upon this latter proposition, sharp issue was made at the trial; the position of the defendant being that it was only required to install and maintain its wires for safely carrying the current from its plant for the lighting of the plaintiff's house, and that the plaintiff must prove that his loss was occasioned by the electric current which passed from defendant's plant, through said wires, into his house. The instructions of the court upon this point are complained of as being conflicting and erroneous. From the charge which was given, we quote the following:

"The court instructs you that it does not make any difference where this electricity came from. If the electricity came in and caused the fire by reason of something about these wires, and you find that the defendant was negligent in putting in these wires and maintaining them, and that such negligence caused the fire, it doesn't make any difference where the electricity comes from. But on the other hand, I also charge you that if the wires were sufficient to maintain the current of electricity from the plant of defendant, and such current as could be reasonably expected to come in through those wires to light the house, then the defendant is not responsible by reason of any increased voltage on those wires that might come from a stroke of lightning, provided the wires were reasonably placed so as to carry the current that was used in lighting the house. The jury are instructed that defendant is required to insulate its wires so as to protect property through which said wires pass, against danger which may arise from a current of electricity generated by defendant's plant, and passing through said wires, and not from a current generated elsewhere and from other agencies, unless such other agencies were with the consent of defendant."

It appears from the record that at the conclusion of the evidence the parties consented that the court should deliver its charge to the jury after the argument, but that the instructions requested

by the respective parties were settled by the court in advance, so that they could be used in the argument. That the trial judge marked as "Given," and appended his name in the manner required by statute to, the following instruction, which had been requested by the defendant: "You are further instructed that if, in weighing the testimony in this case, you are unable to decide therefrom whether the fire was caused from the electric current generated by defendant's plant through said wires, or from lightning either passing through said wires, or striking the house directly, and in another part of the house than through the wires, that you should find your verdict for the defendant. It is the duty of the plaintiff, by a preponderance, to prove that the loss was occasioned by the electric current passing from defendant's plant through said wires into the house, and this proof must be made by a preponderance of the evidence; and, if plaintiff fails to make this proof, your verdict should be for the defendant." Counsel for the defendant made use of this instruction in their argument of the case, and discussed the same before the jury. On the completion of the argument, the court delivered its charge to the jury, and, in so doing, modified this particular instruction by adding thereto and giving in connection therewith the words, "Except as I have said before, it does not make any difference where the power came from—whether of clouds and electricity, or from the plant." Considering the very slight foundation in the evidence for the claim that any current was on these wires from the defendant's plant at the time of the fire, it is readily apparent how prejudicial might have been this modification after the argument was closed. But we think that the chief vice of the court's charge was in the submission to the jury, in this case, of any question as to the defendant's liability for a failure to insulate these wires against electricity having its origin in the clouds or atmosphere. An essential ingredient to any conception of negligence is that it involves the violation of some legal duty which one person owes another—a duty to take care for the safety of the person or property of the other. This duty may be assumed by contract, or it may be imposed by implication of law. Where a

person, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer against those consequences of his actions, which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to "the act of God," and leaves the harm resulting from them to be borne by him upon whom it falls. 1 Thomp. Neg. (2d Ed.), sec. 14. In the conduct of an electric lighting business, the defendant was engaged in handling a most dangerous agency, and, in the generation and distribution of electricity from its plant to its patrons, was unquestionably bound to exercise the highest degree of skill and care for the protection of life and property. The duty thus imposed clearly required that the wires which the defendant "placed through the window casement of plaintiff's house" would be sufficiently insulated to protect said house against injury from any current carried on them from the defendant's plant. This duty did not, however, extend so far as to require the insulation of these wires in a manner to protect against injurious consequences of a lightning stroke, for the evidence shows that it was not practicable to insulate them against lightning, and there is nothing in the record which indicates any assumed or implied obligation of this character. And what we have here said as to lightning must, it seems to us, under the facts of this case, be equally applicable to any induced current of electricity having its origin in the clouds or atmosphere, because there is absolutely nothing in the evidence from which the strength of such a current could be estimated. While the learned trial judge, in other portions of his charge, apparently intended to so declare the law as to relieve the defendant from liability for the consequences of a current of greater voltage than that which would be carried on these wires for the lighting of the plaintiff's house, if the wires were sufficiently installed and insulated for the latter purpose, we feel that, in submitting to the consideration of the jury in this case any question of negligence based upon the defendant's failure to insulate against a foreign current of electricity, he was inviting them into the realm of speculation, in which conjecture, and not evidence, must guide them, and that the

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jury may readily have been misled thereby, to the prejudice of the defendant.

For the errors pointed out, the judgment will be reversed, and the case remanded to the District Court for a new trial.

SLOAN and DOAN, JJ., concur.

CUMBERLAND TELEGRAPH & TELEPHONE CO. v. MARTIN'S ADM'R.

Kentucky; Court of Appeals.

1. **DEATH CAUSED BY LIGHTNING PASSING OVER TELEPHONE WIRE; DUTY TO PROTECT LICENSEES.**—The appellant's intestate took refuge from the rain under the porch of a store building. The decedent did not enter the store but sat upon a dry goods box upon the porch with his back against the grating over the window. A telephone wire ran over the roof of the porch and within two or three inches of it. Lightning struck one of the appellant's telephone poles near the store and was conducted by the wire to the porch, part of it passing to the iron roof, and from the iron roof to the grating and thence through the body of the decedent to the ground, killing him instantly. It appeared that the wire was negligently attached to the building, but it was held that since the decedent was a bare licensee, having no business upon the porch except to get out of the rain, the appellee was under no obligation to such decedent to properly maintain the wire, whatever its responsibility might have been had the injury been occasioned to the owner of the building.

Appeal by defendant from judgment for the plaintiff. Decided October 28, 1903; reported 76 S. W. 394.

Wm. L. Granberry, Humphrey, Burnett & Humphrey, and J. W. Alcorn, for appellant.

R. C. Warren and W. G. Welch, for appellee.

Opinion by HOBSON, J.:

Appellee filed this action to recover of appellant for the death of his intestate, Walter Martin, a young man 25 years old, charg-

ing that his death was caused by the negligence of appellant. He recovered judgment for \$5,000. The only question we deem it necessary to consider on the appeal is whether the facts shown on the trial warranted a recovery. These facts are as follows: On May 18, 1901, a dark cloud came up at Roland, Ky. The deceased, in company with another young man and some boys, took refuge from the rain under the porch of a store building. Part of the boys entered the store, but the deceased remained on the porch, sitting on a goods box, with his back against the grating over the window. This grating ran up near the roof, and consisted of metal rods. A telephone wire belonging to appellant, as found by the jury, ran over the roof of this porch and within two or three inches of it. The roof was of metal and wet. Lightning struck one of the telephone poles about 600 yards from the porch, and, after shattering that pole and several on either side of it, was conducted by the wire to the porch, where it left the wire for the iron roof, or part of it did, and passed from the iron roof to the grating, and thence through the body of the deceased to the ground, killing him instantly. There was sufficient evidence of negligence in the way the wire was attached to the house to go to the jury if the defendant owed any duty to the deceased, or if his death was the proximate result of its negligence. The wire had been placed thus on the building in the year 1899, and there had been some complaint then by the owner about it, and there had been a promise to remove it by the person who put it there; and there was some complaint also in the year 1900, but for some months before the injury nothing appears to have been said about it. Appellant did not put the wire there, but found it on the house when it took charge, but there was evidence of notice by the owner that the wire should be removed after this. There was some conflict in the evidence, but this is as strong a statement of the facts as the proof for appellee warrants. In *Pittsburg, etc., R. R. Co. v. Bingham*, 29 Ohio St. 364, the deceased, being out of employment, went to the passenger station of the railway for pastime and as a place of safety during a storm. The house was negligently constructed, and by reason of this negligence fell during the storm, killing the

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deceased. The action was brought to recover for his death. The court, after pointing out that actionable negligence exists only where he whose acts causes the injury owes to the injured party a duty, and referring to many cases applying this principle, held that the plaintiff could not recover. It said: "It is doubtless true that a railroad company, by erecting station houses and opening them to the public, impliedly licenses all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. An implied license to enter a depot creates no additional duty upon the part of the company as respects the safety of the building entered. Its only effect is to make that lawful which, without it, would be unlawful. *Wood v. Leadbitter*, 13 M. & W. 838. It is a waiver or relinquishment of the right to treat him who has entered as a trespasser." In *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323, 41 Am. Rep. 572, some boys took refuge in an old freight house in a storm, and one of them was injured by the falling of part of the house. The court, after showing that the railroad company owed him no duty, applied the principle that, where there is no duty to the person injured, there is no actionable negligence. In *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514, a long-shoreman, after loading ice on a vessel, went on it after finishing his work merely to gratify his curiosity, and while there fell down an open hatchway, negligently left open, and broke his leg. It was held that the owner of the vessel owed him no duty, and that he assumed all the risks of the place. The court said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor, is well settled. The former enters at his own risk." These decisions are in accord with the entire current of authority, both English and American. Thus in 1 Thompson on Negligence, sec. 946, it is said: "As a general rule, the owner of private grounds is under no obligation to keep them in a safe condition for the

benefit of trespassers, intruders, idlers, bare licensees, or others who come upon them not by an invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." In sections 947-952 many illustrations of this principle are given. To the same effect, see note to *Godley v. Hagerty*, 59 Am. Dec. 736; also note to *Zoebisch v. Tarbell*, 87 Am. Dec. 667; *Hart v. Cole*, (Mass.), 31 N. E. 644, 16 L. R. A. 557; *Sterger v. Van Siclen* (N. Y.), 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594. If it be conceded that the deceased was not technically a trespasser, but a licensee, still he was a bare licensee. He had no business at the store. He went under the porch to get out of the rain, and remained there entirely for his own convenience. Under the above authorities the owner of the property was under no liability to him to keep it safe. If the telephone company had owned both the building and the wire, it would not have been under any responsibility to the deceased for his injury, although he was under its porch by its implied consent, as he was there as a bare licensee, for his own convenience. If the telephone company would not be responsible if it owned both the wire and the building, it is certainly under no greater responsibility when it owned only the wire. If it had put its own wire negligently on its own building, and thus endangered its being struck by lightning, it would be responsible to those it invited to the building in a dangerous condition, but it would not be responsible to those merely using it for their own convenience as a shelter in a time of storm. When it put its wire negligently on another person's building, and was negligent in securing it, it violated its duty to him, but it violated no duty to those to whom neither he nor it were under any obligation. We therefore conclude, for the reasons stated, the plaintiff made out no cause of action against appellant. This conclusion makes it unnecessary for us to consider the other questions discussed.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

UPON PETITION FOR REHEARING.

Opinion by HOBSON, J.:

The distinguished counsel for appellee concedes in the petition for rehearing that the facts of the case are fairly stated in the opinion. He also concedes the soundness of the authorities cited, and that if the telephone company had owned both the house and the wire it would not be responsible for the death of the intestate. But he insists that it does not follow that it is not responsible when it owned only the wire, and allowed it to remain on the building after it was requested by the owner of the building to remove it. No authority is cited by the learned counsel sustaining his contention, and he seems to misapprehend the legal principle upon which the opinion rests. This is that there can be no negligence where there is no legal duty. In 1 Shearman & Redfield on Negligence, sec. 8, in defining negligence it is said: "The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." See, also, to same effect, Cooley on Torts, 659, 660. In Bishop on Non-Contract Law, sec. 446, the rule is thus stated: "To sustain an action for negligence, the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, as explained in the earlier chapters of this volume, there is nothing which the law will redress." He who handles an agency which is of itself dangerous to human life is responsible for injuries therefrom not caused by extraordinary natural occurrences or the interposition of strangers. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298. But as to things which are not of themselves essentially instruments of danger the rule is differ-

ent, and for them the negligent party is not responsible to strangers. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Blakemore v. Railway Co.*, 8 El. & Bl. 1035. If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented; but the electricity which killed the intestate came from the clouds, and was the act of God. The current which the telephone company used in its business was harmless. It owed the intestate no duty to furnish him a safe shelter from the rain. When he used the porch as a shelter, he took it as he found it. The wire of the telephone company was not in or of itself an instrumentality dangerous to human life, and there was no duty violated to the public in a matter whereof the intestate had the right to avail himself. Section 969 of Thompson on Negligence has reference to defects in premises which are in themselves dangerous. Section 807 refers to the liability of the company owning the wire to the owner of the house.

Petition overruled.

Fire caused by lightning; defective wiring.—In the case of *Jackson v. Wisconsin Teleph. Co.*, 5 Am. Electl. Cas. 335, 88 Wis. 243, 60 N. W. 430, it appeared that the defendant, a telephone company, in erecting its lines, attached a wire to flag staffs upon two buildings, on elevated ground, one of which was the plaintiff's barn. The defendant subsequently removed part of its line, but left the wire connecting the two buildings, and extending so that an end of it lay in contact with the roof of the barn. During a thunder storm the barn was burned, and the flag staff upon the other building was shattered by lightning, but the building was uninjured. There was a single stroke of lightning, and it occurred just before the fire broke out. There was a conflict of expert evidence as to the probability of lightning being conducted over the wire from one building to another. The court held that the jury was warranted in finding that the fire was due to the electricity conducted over the wire, and that the defendant's negligence in leaving the wire as it did was the proximate cause of plaintiff's loss. Though the stroke of lightning was an "act of God," that fact could not avail the defendant whose negligence had directed the stroke to the plaintiff's barn.

Where, in an action based upon the destruction of a storehouse and its contents by lightning, it was charged that the electric current was conducted to the building along a telegraph wire which the defendant negligently allowed to come in contact with the building, it was held that the question

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whether the fire was due to the negligence of the telegraph company, or was an act of God, was properly submitted to the jury. *Miles v. Postal Teleg. Cable Co.*, 7 Am. Electl. Cas. 696, 55 S. C. 403, 33 S. E. 493.

Death by lightning conveyed over telephone wire.—It is the duty of a telephone company in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, to so place such instruments and erect such wires as to cause the least possible injury to persons using such instruments or coming in contact with such wires. If, in the exercise of the care of a prudent man in like circumstances, a telephone company has reasonable grounds to apprehend that lightning will be conducted over its wires to and into a house, in which it has placed one of its instruments, and there do injury to persons or property, and there are known and approved devices for arresting or diverting such lightning so as to prevent such injury therefrom, then it is the duty of the company to exercise due care in selecting, placing and maintaining such known and approved devices as are reasonably necessary to guard against accidents fairly to be expected to occur from lightning when conducted into a house over telephone wires. *Griffith v. New England Teleph. & Teleg. Co.*, 7 Am. Electl. Cas. 707, 72 Vt. 441, 48 Atl. 643. In this case there was evidence tending to show that the decedent, while sitting under a telephone instrument, maintained in his house by the defendant company under a contract with him, was killed during a sudden storm by a portion of a diffused bolt of lightning carried into his house and to said instrument over the defendant's wire, and that the portion of the force of lightning by which he was so killed might have been safely conducted to earth by known and approved appliances, and that such appliances were not provided by the defendant. There was, therefore, evidence from which the jury might find that negligence on the part of the defendant was the cause of the decedent's death.

In the case of *Scheiber v. United Teleph. Co.*, 153 Ind. 609, 55 N. E. 742, a complaint alleging injury caused by lightning conducted into a storeroom by the defendant's wires, on account of their defective condition, and that the defect was due to the removal of a telephone belonging to another company, the predecessor of the defendant, and not showing that the defendant created the dangerous condition or had any opportunity to put the wires in a proper condition before the accident, was held insufficient.

DEFECTIVE WIRING OF BUILDINGS.

MILLER V. OURAY ELECTRIC LIGHT & POWER CO.

Colorado, Court of Appeals.

1. **DEATH BY FIRE CAUSED BY DEFECTIVE ELECTRIC WIRING; SUFFICIENCY OF COMPLAINT.**—The plaintiff's son, a minor, while confined in a county jail was killed by the building catching fire from an alleged defect in the electric wiring thereof. The complaint alleged that the defendant company in wiring the building was charged with the duty of so erecting such wires as to enable the passage of the electric current over the same with safety to the occupants of the buildings and to the buildings themselves; and further alleged that such company was grossly negligent in performing such duty. It was held that the complaint stated facts sufficient to constitute a cause of action against the electric company.
2. **LIABILITY OF COUNTY COMMISSIONERS.**—A statute (Colo. Gen. Stats. sec. 1829), making it the duty of the county commissioners to personally examine the jail and the management thereof during each session of the board, and to correct all irregularities and improprieties therein found, imposes no obligation upon them individually to protect the lives of the inmates of the jail, and a failure of such commissioners to properly inspect the electric wiring of the jail by reason of which the jail caught fire and burned, causing the death of the plaintiff's intestate, affords no cause of action for such death against the commissioners in their individual capacities.

Error by plaintiff from judgment sustaining demurrers to complaint. Decided October 13, 1902; reported 70 Pac. 447.

Stuart & Murray and *Story & Story*, for plaintiff in error.

Henry & Sigfrid, for defendants in error.

Opinion by WILSON, P. J.:

While Harry W. Hawkins, a minor, was confined in the jail of Ouray county, charged with a criminal offense, the building caught on fire, and he suffered death from suffocation. The fire is charged to have been the result of defective electric wiring of the building. Mrs. Miller, the mother of the deceased, brought this

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suit to recover damages for the alleged negligence which caused the death of her son, joining as defendants the Ouray Electric Light & Power Company, the three county commissioners, as individuals, the sheriff, and the sureties upon his official bond. The electric light company interposed a demurrer to the complaint, as did also the county commissioners. Each of these demurrers was sustained upon the ground that as to those parties the complaint did not state facts sufficient to constitute a cause of action, and this question alone is involved in the appeal to this court.

These portions of the complaint which will be sufficient for the understanding of this opinion are as follows:

"(2) That at all of the times hereinafter mentioned the defendant the Ouray Electric Light & Power Company is and was a corporation maintaining and operating an electric lighting plant and furnishing electric light in the buildings within the city of Ouray, in the county aforesaid, and, as a part of said business, it from time to time furnished and placed in the buildings in said city wires for conveying the electrical current used in lighting the buildings, and, representing that it had skilled and educated workmen, with sufficient electrical knowledge to place in said buildings the necessary wires, over which to convey the electric current used for furnishing light, in such manner that there would be no danger therefrom, and that such wires would be properly and safely insulated from the buildings and from each other, and was charged with the duty of providing skilled workmen, having sufficient knowledge in the use of electricity to wire the buildings in such manner as would enable the current to be delivered over said wires with safety to the occupants and to said buildings. . . .

"(8) That at the time of the arrest, imprisonment, and death of said Harry W. Hawkins, the only county jail within and for said county of Ouray was a building wholly built of wood, tar paper, and other inflammable materials, containing an iron and steel cage or cages, in which the prisoners were confined; that no beds were provided in said jail, excepting bunches of dry hay placed in said cages during the nighttime, and stowed in the corridor of the building, outside of said cages, when not in use for beds; that said building was not provided with any proper means of ventilation; was wholly unfit for the purposes for which it was used; was artificially lighted by currents of electricity sent over the wires placed in said building and connected with its electric light plant by the defendant the Ouray Electric Light & Power Company; that said wires were carried into said building by said defendant by passing them through a knot hole in the side of the building, without protecting said wires from chafing and rubbing, and the wires inside of said jail building were placed and left in contact with the inflammable materials of which said building was constructed, and in contact

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with each other, and were not properly protected, so as to prevent said wires from shortcircuiting and setting fire to said building, and said wires were allowed to become worn and bare, and in direct contact with each other and the inflammable materials in said building. And by reason of the unskillful and grossly negligent manner of so conducting and placing the wires in said jail building, leaving of said wires without proper insulation, and in contact with each other and the inflammable materials of said building, and the sending of currents of electricity over said wires, as well as by reason of the inflammable materials of which said building was constructed, and the keeping and storing of dry hay in said building, said building was in constant and imminent danger of taking fire, both from within and without, and of burning and suffocating the prisoners kept therein. That the only keys provided for the opening of said building, and of the cages therein, were carried by the sheriff and his deputy, and the said sheriff and his deputy frequently and habitually went away from said building for many hours at a time; and during the time herein specified it was the regular habit and practice of said sheriff and his deputy to lock the prisoners in their cages for the night, to close and fasten all the doors and shutters of said jail building, and then go their several ways to their homes, to remain until morning, taking said keys with them, and to leave said prisoners fastened therein, wholly unprotected and unattended from any danger which might threaten them,—of all of which facts the said defendants had full knowledge. . . .

“(10) That the Ouray Electric Light & Power Company, in conducting the wires in said building, in placing and leaving the same therein in manner above specified, in transmitting currents of electricity over said wires, so negligently, unskillfully, and improperly placed and kept, was grossly negligent and derelict in the duties imposed upon it, and that said negligence resulted in setting fire to said building and in causing the death of the said Hawkins. And the said Lyon, King, and Couchman were grossly negligent and derelict in the duties required of them, in that they wholly failed and neglected to provide a proper county jail, and beds therein, to see that said building was properly and safely lighted, to see that proper care was taken for the safety of the prisoners confined therein, and in that they wholly failed at each session of the board of county commissioners to visit the county jail, and make a personal examination of its sufficiency, the management thereof, and to correct all irregularities found therein.”

It will be observed that the complaint specifically charges the electric light company with having placed and carried the wires into the jail, and with transmitting a current of electricity over the wires for the purpose of lighting the jail at the time of the fire. It also specifically charged that said company was grossly negligent in the placing of said wires, and recites the facts upon

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which said charge of negligence is based. It also alleges that the defendant light company was charged with the duty of providing skilled workmen to wire buildings in such manner as would enable the current to be delivered over said wires with safety to the occupants therein, but that said wires were not so placed. In a recent case decided by this court, it was said:

"We cannot say, as a matter of law, that proof would not be admissible under the averments of the complaint which would justify a verdict that, in leaving the wire exposed as alleged, the defendant was guilty of negligence. If such proof would be admissible, then the complaint, in so far as the charge of negligence is concerned, is sufficient." *Walters v. Light Co.*, 7 Am. Electl. Cas. 515, 12 Colo. App. 146, 54 Pa. 960.

Upon principle, as well as upon the material facts of negligence involved, the case was very similar to this, and we think the decision of that is not only applicable, but conclusive, here. Under the allegations of the complaint, proof would be clearly admissible of the acts charged as constituting negligence, and it would be for a jury to determine as to whether they did constitute it. If it would avail the defendant company at all to show that the building was wired in accordance with the specific directions of the official or officials having charge of the jail, that would be a matter of defense, and to be set up as such by the defendant. In our opinion, the court erred in holding that the complaint did not state facts sufficient to constitute a cause of action against the electric light company.

The plaintiff bases her claim of the individual liability of the commissioners upon the following section of the statutes:

"It shall be the duty of the county commissioners to make personal examination of the jail of their county, its sufficiency, and the management thereof during each session of the board, and to correct all irregularities and improprieties therein found." Gen St. sec. 1820 (Mills' Ann. St. sec. 2523).

It is insisted that this section imposes a double duty upon the commissioners,—an obligation to the public, and another to the individual interested, to wit, the prisoner who may be confined within the jail. The complaint, in our opinion, is defective, as to these commissioners, because it does not allege knowledge on their

part that the condition of the lighting in the jail was defective or dangerous, nor that they could have had such knowledge if they had made the personal examination which it is alleged they failed to make, nor in what respect their alleged failure to make the required inspection contributed to the accident. It may be conceded that they utterly failed to make these visits to the jail, but yet, if such failure was not a contributing cause to the injury, it could not be claimed that they were in any manner liable. There is, however, in our opinion, a still more serious objection to the complaint. The duty imposed by this section of the statute was, we think, a public, official duty, imposed upon them as a board of county commissioners. If the principle contended for by plaintiff were established, it would lead to absurd and most unreasonable results. We do not believe it to have been in the contemplation of the lawmakers, and we know of no authority to that effect, that one or more of the county commissioners might be subjected to an action against him or them individually for damages because a prisoner in the county jail claimed that the food or bedding with which he had been supplied was not of a proper character or was injurious to his health, or that the building in which he was confined was so defective in its construction as to produce a like result. Actions of this character could be maintained if the present one could; the county commissioners being specially charged, as a board of county commissioners representing the county, with the duty of building and keeping in repair county buildings, with the care of all county property, and with the management of the business and concerns of the county. Gen. St. sec. 538 (Mills' Ann. St. sec. 791.) The quoted section in regard to the jail confers upon them no additional power, but simply requires them to make personal examination of it at stated periods. This is an official duty, owing to the public by virtue of their office, and for a breach of it the statutes specifically provide a remedy by suit upon their official bonds. Mills' Ann. St. sec. 825. The words "and to correct all irregularities and improprieties therein found" impose no new obligation upon them. This would have been their duty if these words

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had not been used, by virtue of the statute requiring them to keep public buildings in repair, and charging them with the care of all county property, and with the management of all business and concerns of the county. If the contention of plaintiff be the law, then each individual commissioner would be liable in like actions to this, because of damages suffered by an individual by reason of alleged defects in a public highway, or in a county bridge, or in any public building, or in the public grounds in which it might be situate. To so hold would tend, in the large counties of the state, at least, to bring about, as was said by the Supreme Court of Idaho, "the literal abrogation of the office of county commissioner, for no sane man would assume the position, with such a liability attached." *Worden v. Witt*, 39 Pac. 1114. The duty imposed by the statute under consideration being with reference to the care, custody, and supervision of public property, it would seem clear that the county commissioners, as to the performance of that duty, come within the class of public officers who are recognized by the authorities as subordinate governmental officers and administrative agents, whose duty is owing primarily to the public collectively,—to the body politic, and not to any particular individual,—who act for the public at large. *Mechem, Pub. Off. sec. 590 et seq.*; *Cooley, Torts*, p. 442; *Shear. & R. Neg. sec. 302*. This being true, a breach of the duty here charged will not support an individual action for damages against the commissioners. Mr. Cooley authoritatively lays down this doctrine, and it is supported by the great weight of authority, and so even in cases where a nonperformance of the duty might prejudice an individual. This is held not to constitute a private wrong for which the injured party could have redress by individual action. *Cooley, Torts* (2d Ed.) p. 446 *et seq.*; *Mechem, Pub. Off. secs. 598-606*; *Shear. & R. Neg. sec. 302*. The court did not err in sustaining the demurrer of the county commissioners.

For the reason, however, that the demurrer of the electric light company should not have been sustained, the judgment will be reversed, and the cause remanded for further proceedings in accordance with the views which we have expressed. Reversed.

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Fire caused by defective insulation.—See *National Fire Ins. Co. v. Denver Cons. Electl. Co.*, 7 Am. Electl. Cas. 715 (Colo. Appeals), holding that an electric light company lighting a building under contract, is not responsible for injury caused by defective wiring of a building by other contractors, unless it have knowledge of such defect; such knowledge is not to be imputed from the fact that a superintendent of construction of the company, not shown to be an officer or director or to have examined the wires, or to have been in the company's employ when the loss occurred, casually saw the work as it was going on. See, also, *Dechert v. Municipal Electl. L. Co.*, 39 App. Div. 490, 67 N. Y. Supp. 225; *Waller v. Leavenworth L. & H. Co.*, 9 Kan. Ct. App. 301, 61 Pac. 327 (an action for damages from fire caused by defective insulation, holding that where one electric light company purchases the plant of another company and continues its business, it impliedly contracts with its customers and the public that it will use such appliances and care as are known to the business to protect them from harm, and is liable to any one who suffers from its failure to do so).

DENVER CONSOLIDATED ELECTRIC CO. v. LAWRENCE.

Colorado; Supreme Court.

1. **INJURY CAUSED BY ELECTRIC SHOCK WHILE ATTEMPTING TO TURN ON ELECTRIC LIGHT; SUFFICIENCY OF COMPLAINT.**—A complaint stating, in substance, that the defendant is in the exclusive control of a plant for the generation and distribution of electricity, and that it was supplying electricity, for pay, to the residence where the plaintiff resided; that by reason of the failure of the defendant to keep and maintain its plant and appurtenances in good and safe condition, and to inspect and examine the same from time to time, the plaintiff, without fault or negligence on his part, while attempting to turn on the electric light, received a severe charge and current of electricity, is sufficient to make out a *prima facie* case of liability.
2. **OBLIGATION OF ELECTRIC LIGHT COMPANY TO PROTECT ITS PATRONS.**—The patrons of an electric light company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light.
3. **SPECIFIC ACT OR OMISSION CAUSING ACCIDENT.**—Where it appears that the defendant so conducted its business that the plaintiff received a shock of electricity while engaged in turning on a light; and that the volume

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of the current received was many times that furnished for lighting purposes; that the plaintiff had no means of knowing what, if any, defects existed in the plant or appliances of the defendant; and that the transformer from which the current for use in the residence where the injury was received was taken away by the company immediately after it was informed of the injury; it was held proper to charge the jury that the plaintiff was not required to point out the specific act or omission which caused the accident.

4. **INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE; DEFECTIVE APPLIANCES IN PLAINTIFF'S HOUSE.**—An instruction to the effect that if the plaintiff did not know, and in the exercise of reasonable care and caution could not have known, that in attempting to turn on the electric light he was in danger of receiving an electric shock, and in so doing acted innocently and without fault he is not guilty of such contributory negligence as will defeat his right to recover, and that if the plaintiff's share in the negligence was innocent and not faulty, it furnished no excuse for the defendant, was held erroneous but not prejudicial to the defendant because of the failure to show that the plaintiff was guilty of contributory negligence.
5. **EVIDENCE SUSTAINING VERDICT.**—Where it appears that the plaintiff was injured by an electric shock received while attempting to turn on the electric light, the evidence as to the overcharging of the electric light wires with electricity was considered and deemed sufficient to sustain the verdict against the defendant. Evidence was also considered as to the contributory negligence of the plaintiff in standing upon a metal register, connected with the earth by metal pipes, while attempting to turn on the light by taking hold of the brass trimmings of the incandescent light instead of the rubber key, and held insufficient to establish contributory negligence.
6. **DUTY OF INSPECTION.**—Reasonable prudence and caution require companies selling electricity to maintain a system of frequent inspection.
7. **PROVISION OF CONTRACT RELIEVING COMPANY OF LIABILITY FOR DAMAGE.**—A provision in a contract agreeing to furnish light to a patron that the company shall not be "liable in any event for damage to person or property arising, accruing or resulting from the use of the light," cannot relieve the company of its liability for failure to perform its duty.

Appeal by defendant from judgment for plaintiff. Decided May 5, 1903; reported 73 Pac. 39.

The complaint, filed May 13, 1899, alleges that the defendant is a corporation engaged in the business of generating, producing and distributing electricity, and supplying the same for light and other purposes to the general public for profit; that the company, in consideration of the compensation required, was engaged in supplying W. H. Lawrence with electricity for lighting purposes at his residence, No. 247 South Fourteenth street, in the city

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of Denver; that it was the duty of said company, in so furnishing electricity, to at all times have and maintain a safe plant, machinery, poles, wires, conduits, converter boxes, transformers and other appurtenances for the proper and safe generation and distribution of electricity throughout said city and to the said premises, and also to inspect and examine the same from time to time, and to at all times keep and maintain the same in good and safe condition, so that the said Lawrence and each member of his family might safely use the said electricity upon said premises without danger of damage or injury to them, or either of them; that the plaintiff is a son of said Lawrence, and at the time mentioned was living with his father at his said residence in Denver; that on the evening of April 13, 1899, and prior thereto, the said company did not discharge its said duties, hereinbefore alleged, so that at the time last aforesaid, while the plaintiff was attempting to turn on the electric light in one of the rooms of said premises, and without any carelessness or negligence whatever on his part, he received into and upon his body a severe and terrific charge and current of electricity, whereby the plaintiff suffered serious and permanent injuries, burning his hands and feet so that he was laid up and rendered sore, sick and lame for a long period of time, and was and is and will be painfully and seriously burned and scarred and permanently injured for the remainder of his life. Following are allegations concerning the earning capacity of the plaintiff, and a prayer for damages in the sum of \$20,000. A demurrer upon the ground that "the complaint does not state a cause of action" was overruled. The defendant answered over.

The fourth paragraph of the answer is as follows: "Denies that at the times named in said complaint, or at all, it was or is the duty of defendant corporation in furnishing electricity to at all times have or maintain a sound or safe plant, machinery, poles, wires, conduits, converter boxes, transformers, or other appliances, for the proper or safe generation, production, or distribution of such electricity throughout said city or to said premises; on the contrary thereof, avers that this defendant was not at the time named in said complaint, or at all, an insurer of the soundness or safety of its said property, but was and is bound to exercise ordinary and reasonable care and diligence and prudence in order to secure the safety and soundness of its said property; admits that it was the duty of this defendant to inspect and examine its said property from time to time, and to at all times use reasonable and ordinary care and diligence in order to keep and maintain the same in good and safe condition; denies that its duty extended any further in the premises; denies that it was or is an insurer of the safety of the said Lawrence or of any member of his family, or that it was ever at any time bound to any greater duty than the exercise of ordinary care to avoid danger, damage or injury to the said Lawrence and to his family."

The sixth paragraph denies that at all times in said complaint named, or on, or prior to, or about, the evening of April 13, 1899, or at all, this defendant did not discharge its duty in the premises.

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For a further answer and defense, the defendant alleges that the said injuries were caused by the carelessness and negligence of the plaintiff, directly contributing thereto; and avers that the fixtures and appliances used by the plaintiff in and about the premises were not the property of this defendant, or furnished or provided by this defendant, but, on the contrary, were the property of the said William H. Lawrence; and avers that the appliances furnished and provided as aforesaid were so carelessly and negligently used by the plaintiff at the time and place in question as to induce a current of electricity to be delivered from the ground up through the register upon which the plaintiff was then and there standing, thereby inflicting all injuries received by the plaintiff in the premises. Avers that the plaintiff had just stepped from the bath tub, and was then and there moist and wet with the water used in bathing, and that the plaintiff did, in the attempt to use the fixtures and appliances furnished and provided as aforesaid, carelessly and negligently stand upon said register composed of steel, iron or some conducting substance, and did then and there carelessly and negligently fail to take hold of the nonconducting appliance furnished for the purpose of turning on the electricity, and carelessly and negligently seized hold of the metallic portion of the fixtures so furnished and provided, and, by reason of said combined and connected negligent acts on the part of the plaintiff, thereby induced a current of electricity to be delivered either from above or below, through his body, thereby causing the accident and injuries complained of. And it avers that the defendant, in all that it did in and about the premises, had fully performed its duty, and had used every care and precaution required of it by law or at all, to render the appliances and material and machinery furnished by it sound and complete; that it had caused each and every part of the machinery used by it to be tested, examined, and inspected; and avers that the accident and injury complained of were not the result of any cause which the defendant could or should have foreseen, but, on the contrary thereof, were occasioned by the carelessness and negligence of the plaintiff himself, and by the acts and conduct on the plaintiff's part which this defendant did not and could not foresee.

And for a supplemental answer the defendant alleges that it entered into a contract with said W. H. Lawrence, containing certain stipulations and covenants, among which is the following, to wit: "The subscriber agrees to comply with the rules, regulations and other provisions of the company printed on this contract." That among the rules and regulations and provisions printed upon said contract is the following, to wit: "This company shall not be liable in any event for damage to person or property arising, accruing, or resulting from the use of light." That said contract was signed by said Lawrence on April 16, 1898, and was accepted by the defendant company, and that if any injury was sustained as in said complaint alleged, or otherwise, said injury arose, accrued, and resulted from the use of light, and not otherwise, and was due wholly to the negligent and reckless manner in which plaintiff used or attempted to use said light. And defendant alleges that, by virtue of the facts above set forth, the defendant company was released

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from all liability for injury to this plaintiff arising from the use of light in the premises occupied by said Lawrence.

The jury returned a verdict in favor of the plaintiff in the sum of \$5,000, and judgment was rendered upon the verdict. The company appeals. It complains that the court erred in the various stages of the cause, and has specified 101 instances in which it is claimed the court committed error. The ruling of the court upon the demurrer is mainly relied upon to reverse the judgment. It is said that the complaint does not allege negligence or failure to exercise reasonable care in providing and maintaining good, reliable, and efficient appliances for the generation and distribution of electricity to its patrons. That the theory of the plaintiff in preparing the case was that the defendant was bound to furnish an absolutely safe plant and appliances—that the defendant was an insurer of its patrons against injury. That the obligation which the law imposes upon the defendant is that of using ordinary care in the operation of its plant, and not that of an insurer. The question of the sufficiency of the complaint was also raised by objections to testimony.

Thomas, Bryant & Lee, for appellant.

James H. Brown and Andrew W. Gillette, for appellee.

Opinion by STEELE, J. (after stating the facts):

The complaint alleges that the defendant, at the time the plaintiff received the injuries, was the owner of and in the exclusive operation and management of an electric light plant in the city of Denver for the generation and distribution of electricity for light among and to the general public and residents of the city of Denver, and was engaged in the business of selling and supplying electricity to the general public; that the defendant was furnishing electricity for lighting purposes to the father of the plaintiff, at his residence in the city of Denver; that the plaintiff was residing with his father, and was a member of the family, at the time he received the injuries; that it was and is the duty of the defendant to at all times have and maintain a sound and safe plant, machinery, appliances, etc., and to inspect and examine the same from time to time, and to keep the same in good and safe condition, so that its patrons might safely use electricity; that the defendant did not discharge its said duties, so that, while the plaintiff was attempting to turn on the electric light in one of the rooms of

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his father's residence, without any carelessness or negligence on his part, he received a severe and terrific charge of electricity. We are of opinion that the complaint states a cause of action. It was held by this court in *Wilson et al. v. D., S. P. & P. R. R.*, 7 Colo. 101, 2 Pac. 1, that—

“When negligence has been alleged in general terms, while the pleading is not for this cause obnoxious to demurrer, yet, if the plaintiff possesses more specific information, he may be required, on motion, to make his complaint more definite and certain.”

The demurrer admits the facts well pleaded. The facts stated in the complaint, in substance, are that the defendant is in the exclusive control of a plant for the generation and distribution of electricity, and that it was supplying, for pay, the residence where plaintiff resided, electricity from its plant; that by reason of the failure of the defendant to keep and maintain its plant and appurtenances in good and safe condition, and to inspect and examine the same from time to time, the plaintiff, without fault or negligence on his part, while attempting to turn on the electric light, received a severe and terrific charge and current of electricity. Ordinarily the allegations of duty and a breach thereof are not sufficient; but if the duty results from the facts stated, then the allegations of duty may be discarded as surplusage, and the complaint held to be sufficient. If the allegations of the complaint concerning the relationship of the parties and the character of the injuries received make out a *prima facie* case of liability, then the complaint is good as against a general demurrer. We think the complaint does, from the very character of the accident as set forth therein, call upon the defendant to make defense to the case of negligence, in supplying electricity to the residence, which the facts as charged make out. The business of the defendant is that of selling electricity to the people of Denver—a business so fraught with peril to the public that the highest degree of care which skill and foresight can obtain, consistent with the practical conduct of its affairs under the known methods and present state of its particular art, is demanded. *Denver Electric Co. v. Simpson*,

5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

The plaintiff, while attempting to do that which every patron of the company must do to make use of the electric light, received into his body a current of electricity, burning his hands and feet and permanently injuring him. Such injuries are not, under ordinary circumstances, received by persons who turn on an incandescent lamp, if the company supplying the current has not been negligent. The defendant, when it contracted with the father of the plaintiff to sell electricity for light, contracted to keep its plant and appliances in such condition that no greater volume of electricity would be carried into the house than was necessary for its proper lighting. The quantity of electricity required for lighting purposes in residences is not sufficient, if it pass through the body, to cause the injuries described by the plaintiff in his complaint. It follows, therefore, that the plaintiff must have received a very much greater quantity of electricity than the company contracted to supply. The court, therefore, did not err in overruling the demurrer to the complaint, nor in overruling the objections to the introduction of testimony.

The company insists that it is not an insurer, and that its obligation is that of using ordinary care. We are not prepared to say that it is an insurer, but the patrons of the company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light. With reference to the liability of persons or corporations supplying electricity, Thompson, in his Commentaries on the Law of Negligence, at section 796, has this to say: "It may be doubted whether persons or corporations employing, for their own private advantage, so dangerous an agency as electricity, ought not to be regarded as *quasi* insurers, as toward third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency on his own land, ought not to be held to the

obligation of restraining it, that is, of insulating it, at his peril; which was the obligation put upon landowners in respect of water, which from its nature is pressing outward in all directions and continually struggling to break through any artificial barriers by which it may be restrained."

The court refused instructions offered by the defendant numbered 1, 2, 3, 9 and 11; the court gave defendant's instructions numbered 4, 6, 7, 8, 10, 12, 13, 14 and 15. The refusal of the court to give instructions offered is assigned as error. The court, we think, properly refused these instructions. No. 1 is a direction to return a verdict for the defendant. In No. 2 the jury is told that the defendant was only bound to exercise reasonable care, and in No. 3 reasonable care is defined to be such care as will be exercised by a reasonably prudent and cautious person under the same or similar circumstances. The instructions do not declare the law as applicable to the facts of this case. Moreover, the court in other instructions correctly declared that the defendant was bound to exercise the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and timely inspection of its entire plant which was attainable, consistent with the practical conduct of its business according to the best known methods of the State of its art at and prior to the time of the disaster. Instruction No. 9 offered was not in accordance with the evidence, and was properly refused. Instruction No. 11 was to the effect that, if the jury believed that the defendant had exercised the usual and customary care and precaution which its experience had demonstrated to be safe and sufficient, and that the accident could not have been reasonably foreseen or prevented by any precaution taken by the defendant, the verdict must be for the defendant. The propositions stated were, in effect, given in instruction No. 7 offered by the defendant.

Counsel say that the instructions given are confusing; that in giving instruction No. 4 offered by the plaintiff, and 6 and 12 offered by the defendant, the court gave inconsistent and irreconcilable instructions. In instruction No. 4 the jury was told that in cases where the business and appliances are shown to be under

the exclusive control of the defendant, and the accident is such as would not, in the ordinary course of things, occur if the defendant were exercising proper care, or where it is shown that the real cause of the accident may be the negligence of the defendant, and that the defendant knew whether it was negligent or not, it is not incumbent upon the plaintiff to point out to the jury the particular act or omission constituting the negligence; while in instructions 4, 6 and 12 offered by the defendant, and given, the jury is instructed: (1) That, if the plaintiff has failed to establish negligence by a preponderance of the evidence, the verdict must be for the defendant. (2) That the omission of the defendant company to perform the duties required of it by law must be established by a preponderance of the evidence, and that, unless such omission be established, the verdict must be for the defendant. And (3) that, if the jury is unable to determine from the evidence what was the proximate cause of the accident and injury complained of, the verdict must be for the defendant. These instructions are inconsistent, and many authorities are cited, from this and other States, holding that where two instructions are given, one correct and one incorrect, the court will not assume that the jury followed the correct statement of the law. These authorities are not applicable to this case, for the reason that the rule applies only where the giving of an incorrect instruction is prejudicial. The instructions given at the request of this defendant were more favorable than it was entitled to, and instructions given at the request of the plaintiff state the law applicable to cases like this. The defendant so conducted its business that a member of the household of one of its patrons received a shock of electricity while engaged in turning on the light. It was shown by the testimony that the volume of the current received was many times that furnished for lighting purposes. The injured person, it was shown, had no means of knowing what, if any, defects existed in the plant or appliances of the defendant. Moreover, the transformer from which the current for use in the residence was supplied was taken away by

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the company immediately after it was informed of the accident. Under such circumstances it was not improper to charge the jury that the plaintiff was not required to point out the specific act or omission which caused the accident.

In instruction No. 7 the jury was told that contributory negligence would prevent the plaintiff from recovering; that such negligence must be without fault or misconduct on the part of the injured party; that, if the plaintiff's share in the negligence was innocent and not faulty, it furnished no excuse for the defendant; and that if Lawrence did not know, and in the exercise of reasonable care and caution could not have known, that in attempting to turn on the electric light he was in danger of receiving an electric shock, and in so doing acted innocently and without fault, he is not guilty of such contributory negligence as will defeat his right to recover. The instruction is objected to because it distinguishes between guilty negligence and innocent negligence, when the law recognizes no such distinction. If a person receives an injury from another, and the person injured did not know of the danger, and could not have known of it if he had exercised reasonable care and caution, he is not guilty of contributory negligence; and it makes no difference whether the negligence contributing to the injury is innocent or faulty, if the injured party by the exercise of due caution could have prevented the injury. We are inclined to agree with the appellant that the instruction given is erroneous, but there is no evidence in the case showing Lawrence to have been guilty of contributory negligence. It is asserted that Lawrence knew that he was dealing with a dangerous agency, that he knew the qualities of electricity, that he knew that metal is a conductor, that he knew that the register was connected with the furnace or basement (for he must be presumed to have known the structure of his own house), that he was using appliances wholly under his control, and if the fixtures had been in proper repair, or if the appellee had not stood upon the register, the accident could not have happened. There is no evidence showing that the plaintiff was guilty of contributory negligence. Nothing is shown in the record which would warrant a court in

finding that the fixtures in the Lawrence residence were not in proper repair, or that the accident could not have happened but for the want of care on the part of the plaintiff, except the testimony of the expert witnesses who testified that the accident could not have happened if the interior fixtures were in proper repair. The instruction, therefore, was not prejudicial to the defendant.

Under general allegations of damages, the court admitted proof of the physical condition of the plaintiff before and after the injury. It is contended by the defendant that the court erred in allowing plaintiff's witnesses to testify to injuries to particular organs, and injuries of peculiar and extraordinary kinds. The allegation of the complaint is that the plaintiff, by reason of the injury, "suffered painful, serious and permanent injuries in and upon his person and body, burning his hands and feet so that he was laid up and rendered sore, sick and lame for a long period of time, . . . and was and is and will be painfully and seriously burned, scarred and permanently injured for the remainder of his life." We are of opinion that the allegation was sufficient to permit proof of the particular matters testified to, and that they were such as must be anticipated as the natural and ordinary consequences of receiving a current of electricity of such volume as the witnesses have testified the plaintiff received. The defendant did not ask to have the complaint made more specific, and it can not be heard to complain that the court, under a general allegation, admitted proof of specific matters.

The defendant insists that the damages are excessive, and has produced a great number of authorities holding that verdicts for like amounts, awarded for similar injuries, were too large. The jury heard a detailed account of the plaintiff's injuries, and saw for themselves the condition of the plaintiff's hands and feet. We are not warranted in disturbing the verdict, unless the amount of damages awarded is so manifestly disproportionate to the injury received as to make it apparent that the jury was influenced by prejudice or misapprehension, or by some corrupt or improper consideration. *Wall v. Livezey*, 6 Colo. 474.

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The defendant further says that the evidence does not sustain the verdict, and that, if all its other contentions are decided adversely to it, the judgment must be reversed because the evidence fails to show that the defendant has been negligent, but does show that the accident could not have happened but for a defect in the interior wires and fixtures, which belonged to and were under the control of the appellee. We are of opinion that the evidence supported the verdict, and that there were facts testified to from which the jury was warranted in finding that the defendant was guilty of negligence, or, at least, that it failed to overcome the *prima facie* case made by the plaintiff. These facts appeared upon the trial: That the defendant company was in the exclusive control of a plant for the generation of electricity; that its business was that of selling electricity for lighting purposes; that the plaintiff was a member of the family of one of the patrons of the defendant company; that it carried on its primary wires a current of 1,000 volts; that a converter box under the control of the defendant was used for the purpose of supplying the residence in question with a current of 50 volts, and no more; that if the converter box, or transformer, as it is sometimes called, were in proper condition, no more than 50 volts would be carried into the house on the secondary wire, although the primary wires carried very much more than 1,000 volts; that the plaintiff, on a certain evening, while attempting to turn on the electric light, received a current of electricity into his body of several hundred volts; that the shock rendered him unconscious for a time, his hands and feet were seriously burned, and a portion of one foot had to be amputated; that after the accident the city electrician made an examination of the wiring in the house, and an examination of the converter box; that a partial examination of the fixtures in the house disclosed no defect, and that the examination of the converter box did show a defect; that the official disconnected the house wires and took out the converter box, because it was unsafe; that a current of 50 volts is not a dangerous current. With the facts before them, the jury was perfectly justified in returning a verdict against the defendant.

The defendant, in support of its contention that it was not guilty of negligence, and that the plaintiff was guilty of contributory negligence, introduced testimony tending to establish these facts: That the plaintiff could not have received the shock if he had held the rubber key while turning on the light, unless the inside wiring was defective; that the plaintiff, when attempting to turn on the light, probably stood upon the metal register connected with the earth by metal pipes; that he probably took hold of the brass trimmings of the incandescent lamp instead of the rubber key; that no accident of the kind ever occurred at the place before; that, if the voltage testified to as being necessary to produce the injuries had passed over the wires in the house, the light would have burned with a white light, for an instant only; that the light was used by the denizens of the residence a few moments after the accident, and that the light burned steadily; that all the appliances of the company are of standard makes, and that the business methods of the company have had the approval of nineteen years of practical test, and have been found sufficient; that no evidence was offered showing that appellant failed to use any precaution employed by any other company; that the transformer used was the best that had been ascertained at that time, and in that state of the science of electricity. But the jury, under proper instructions, found against the defendant.

The fact that the plaintiff, in attempting to turn on the light, touched not only the rubber key but some other part of the fixtures, or that he stood upon a metal register, cannot be regarded as a want of due care and caution. The fact that the interior fixtures may have been out of repair cannot relieve the company of the responsibility it owes to the public, and owed to the plaintiff, to not permit a deadly current of electricity to enter the house, if within its power to prevent. The jury was instructed that even if the company's appliances were defective and the accident occurred by reason of such defect, nevertheless, unless the defendant knew or could have known by the exercise of reasonable care and caution of such defect, and have repaired the same and thereby have prevented the accident, that the plaintiff could not recover.

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And the jury must have found that the appliances of the company were out of repair, and that it could have discovered the defect by the timely test and inspection of its transformers.

We have held in the case of a gas company, quoting from *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653, that: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business." *United Oil Company v. Roseberry*, 30 Colo. —, 69 Pac. 588.

The testimony shows that a very slight defect in the insulation of the wires carrying currents for distribution, or the least deterioration in the materials used for such insulation, may produce serious results, and that the climatic conditions in this vicinity are such that the materials used for such insulation are less durable than in lower altitudes. Reasonable prudence and caution, then, would require that companies selling electricity should maintain a system of frequent inspection because of the climatic conditions peculiar to this altitude.

The defendant introduced a contract with W. H. Lawrence, the father of the plaintiff, by the terms of which the company agreed to furnish light at a certain stipulated price. This was introduced, probably, in support of the allegations of the supplemental answer. By this contract the subscriber agrees to comply with all the rules, regulations and other provisions printed on the contract. On the contract there is printed a provision that in case the supply of light should fail from natural causes or accident, in

any way, the company shall be liable for damages only after notice, and then only for the abatement of rent during such interruption; "nor shall it be liable in any event for damage to person or property arising, accruing or resulting from the use of the light." The object of this provision is to relieve the company from the obligation it owes to the general public and its patrons. Stipulations of this character cannot relieve the company of its liability for failure to perform its duty, and courts usually decline to enforce them, upon the ground that they are unconscionable and in contravention of public policy.

Other questions are presented by the assignment of errors, but we do not discuss them. We are satisfied, from an examination of the whole record, that substantial justice has been done the parties; that the jury could not properly have rendered any other verdict than one holding the company responsible for the injury.

The verdict of the jury being reasonable under the circumstances shown, we shall affirm the judgment. Affirmed.

Death by shock from electric lamp.—In the case of *Alton Ry. & Ill. Co. v. Foulds*, 7 Am. Electl. Cas. 548, 81 Ill. App. 322, it appeared that the plaintiff's wife in taking hold of the wire or metal socket of an electric lamp in her house in the act of lighting it, received a fatal shock. There was evidence of a grounded primary wire and of conditions rendering it possible for the current to pass around instead of through the transformer; neither of which alone could, but both together might, have caused the deadly current to enter the house, resulting in the death in question. It was held that the question of the defendant's negligence was proper for the jury. See note at end of above case in 7 Am. Electl. Cas. 556.

PART VII.

INJURIES TO EMPLOYEES.

(633)

1. The first part of the document is a list of names and titles.

2. The second part of the document is a list of names and titles.

3. The third part of the document is a list of names and titles.

INJURY TO EMPLOYEES BY CONTACT WITH LIVE WIRES.

TEDFORD v. LOS ANGELES ELECTRIC CO.

California; Supreme Court.

1. INJURY TO UNSKILLED EMPLOYEE; DUTY TO INSTRUCT.—The plaintiff was employed by the defendant as a common unskilled laborer to do the ordinary work of digging holes for electric poles and other general street work. He was directed by the foreman of the defendant to go upon a small platform attached to a pole at a distance of about eighteen feet above the ground, and scrape one of the electric wires. While engaged in this occupation he received an electric shock causing him to fall to the ground, and seriously injuring him. He had no knowledge of the dangers of such work and was not instructed or warned as to such danger, nor was he furnished with any of the ordinary protective appliances used by linemen. It was held that the defendant was liable because of its failure to instruct and warn the plaintiff as to the hidden dangers; the duty of imparting such instruction is personal to the employer and cannot be delegated to another employee.

Appeal by defendant from judgment for plaintiff. Decided August 30, 1901; reported, 134 Cal. 76, 66 Pac. 76.

Gibbon & Halsted and *W. A. Cheney*, for appellant.

Henry T. Gage and *W. T. Foley*, for respondent.

Opinion by McFARLAND, J.:

This is an action to recover damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant. The jury returned a verdict for the plaintiff in the sum of \$15,000. Defendant appeals from an order denying its motion for a new trial.

Defendant is a corporation engaged in furnishing, carrying, and distributing electricity through the city of Los Angeles for light-

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ing, motive power, etc., over poles and running wires along the streets and public places of said city. Plaintiff was an employe of defendant, and at the time when the injuries complained of were received was at work, about 18 feet above the ground, on one of the poles of defendant's system. He was standing on a small platform attached to the pole, and was engaged in scraping one of the wires, when he suddenly fell to the ground, and was badly injured. It is not contended that the place where plaintiff was working was unsafe on account of its height, or for any defect in the platform. It is averred, however, in the complaint, that his fall was caused by a strong electrical shock, which rendered him unconscious, and threw him backwards to the ground; and there was sufficient evidence to warrant the jury in finding that this averment was true. At the time of the action, plaintiff was working under the directions of one Burge, who was a foreman in charge of a gang of men of which plaintiff was one, and at this time Burge was himself working on the same pole, several feet above the platform on which plaintiff stood. The evidence does not make it entirely clear how the current of electricity came in contact with plaintiff's person. It is averred in the complaint that at the time plaintiff reached the platform there was a strong current running at that point through the wires, parts of which were not insulated. Defendant contends that this was not true; that the wires then were all "dead"; and that, if plaintiff was touched by a current at all, such current was turned on afterwards by the said Burge. And therefore defendant contends that, if plaintiff was injured at all by a current of electricity which was negligently permitted to pass through the wires where he was working, the negligence was that of Burge; that the latter was a co-employe and fellow servant with plaintiff; and that plaintiff cannot recover of the employer, the defendant, for injuries caused by the negligence of the fellow servant, Burge. There is no doubt that plaintiff and Burge were, in a general sense, fellow servants. This relation between them was not changed by the fact that Burge occupied a superior position in the general service. *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, and cases there cited.

If, therefore, plaintiff was injured by the negligence of Burge, and the negligence did not involve a duty which the defendant, as employer, owed personally to plaintiff, as employe, then the offending fellow servant was alone responsible, and the judgment against defendant was unwarranted, as there is no claim that there was any want of care in selecting Burge, or that he was in any way incompetent. But there are certain duties which an employer owes personally to his employes, and he cannot avoid responsibility for the injury to one servant, caused by the failure to perform such duties by delegating their performance to another servant. In such case the fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer,—sometimes called a vice principal. In such case the negligence of the servant is the negligence of the principal, for which the latter must answer. See *Davis v. Pacific Co.*, 98 Cal. 13, 32 Pac. 646; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Elledge v. Railway Co.*, 100 Cal. 282, 34 Pac. 720; *Nixon v. Selby Co.*, 102 Cal. 458, 36 Pac. 803. Some of such duties, well established in the law, are to furnish proper machinery and appliances and keep them in repair, to exercise care in selecting competent servants, to take reasonable care for the safety of the employes, etc. It is also one of these duties to give careful instructions, directions, and warnings to a youthful or inexperienced servant of unusual and hidden dangers of which the employer is aware, and of which the servant, to the employer's knowledge, is ignorant. *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, and authorities there cited; *Ryan v. Los Angeles Co.*, 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; *Gibson v. Furniture Co.*, 113 Cal. 1, 45 Pac. 5; *Verdelli v. Commercial Co.*, 115 Cal. 517, 47 Pac. 364; *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041; *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Hanley v. Construction Co.*, 127 Cal. 232, 59 Pac. 577. And in such case the employer cannot escape the responsibility by delegating this duty to a fellow servant of the person injured. See cases above cited. Now, in the case at bar it is averred in the complaint that plaintiff was employed by defendant as a common,

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unskilled laborer, to do "the ordinary work of digging holes for electric poles, repairing electric poles, driving a horse and wagon, and in performing other street work for the maintenance of said poles and wires used in said business of the defendant; and said work was not of a skilled kind, nor was said work of a dangerous character." It is further averred that the work of a "lineman" in defendant's business required great skill and care, and was of a dangerous character; that the dangerous character of such work was well known to defendant, but that plaintiff was wholly unacquainted with the duties and dangers of such work, and wholly unskilled therein,—“all of which was at all times herein stated known to said defendant; and said plaintiff did not know, nor was he ever informed by said defendant, nor by any one else, of the dangerous character of such work, nor of the risk incident thereto.” And it is further averred that, being thus, to defendant's knowledge, inexperienced, and ignorant of the dangers of the work of a lineman upon wires, he was, without any instructions or warning, and without being furnished with rubber gloves or other protective appliances used by linemen, negligently ordered by defendant to ascend said pole and scrape the wires. While there was some conflict in the testimony as to some of these averments, there was sufficient evidence to warrant the jury in finding that they were true; and, this being so, it was the duty of defendant to inform and warn plaintiff of the peril to which he ignorantly exposed himself by coming in contact with an invisible and dangerous electrical current. The contention, therefore, that under the law the verdict was not warranted by the evidence, cannot be maintained.

There are a number of exceptions to instructions given by the court on its own motion, to instructions given at the request of plaintiff, and to the refusal of instructions asked by defendant. We do not, however, deem it necessary to discuss these instructions in detail. If the law be as above stated,—that is, if the duty to instruct and warn plaintiff as above stated was a duty which defendant personally owed to plaintiff, and which it could not avoid by delegating it to Burge,—then the rulings of the court in

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giving and refusing instructions were correct. The main objection made by defendant to these rulings is that they should have been made upon the theory that Burge and plaintiff were fellow servants, and that the general rule as to injuries caused by the negligence of a fellow servant should be rigidly applied to the case at bar, and that defendant was not responsible if Burge neglected to inform and warn plaintiff of the dangers, to him unknown, to which a compliance with Burge's order exposed him. In the instructions on other points we see no error. Questions of fact were properly submitted to the jury.

It is strenuously contended that the verdict is excessive. The amount of damages awarded by the jury was, under the circumstances, quite large. A smaller amount would, perhaps, have been more just. But we cannot say that, as a matter of law, the verdict should be set aside on the ground of excessive damages. The order appealed from is affirmed.

We concur: TEMPLE and HENSHAW, JJ.

Master's duty to instruct.—In the case of *Strattner v. Wilmington City Electric Co.*, 3 Pen. (Del.) 245, 50 Atl. 57, the plaintiff, a boy of about seventeen years of age, was in the employ of the defendant company, and while operating switches and taking and registering therefrom the electric current generated by the defendant's plant, he received an electric shock by taking hold of the handles of the right hand switch and also of the left hand switch at the same time, thus forming an electric circuit. The plaintiff alleged and testified that he was not instructed by the defendant company as to the danger in taking hold of the handles of both switches at the same time. The court, in charging the jury, said:

"A servant assumes all the ordinary and apparent risks of his employment. A master, as such, is not an insurer of the safety of his servant. It is the duty of the master to give such instruction and warning to his servant as to the dangerous character of his employment as may reasonably enable him to understand the peril to which he is exposed. Such instruction and warning should be measured in each case by the youth, inexperience, or ignorance of the servant. If the defendant did not so instruct and warn the plaintiff, and the injuries complained of resulted from that cause alone, then the plaintiff would be entitled to recover. The measure of such instruction in case of infancy would be modified according 'to the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with all the surroundings and conditions in each particular case.' *Weldon v. Railroad Co.*, 2 Pennewill, 14, 43 Atl. 156; *Tully v. Same*, 2 Pennewill, 541, 47 Atl. 1019. Such maturity, capacity, understanding, and fa-

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miliarity in this case are to be tested by the plaintiff's condition at the time of the accident, and not by any additional maturity or capacity that may have come to him since that time, if any such there be. But, whether the plaintiff was so instructed and warned or not, if he knew the danger to which he was exposed, or in the exercise of reasonable care might have known it, then he assumed the risk, and would not be entitled to recover; as in such case he would be guilty of contributory negligence."

In this same connection see also the case of *Karczewski v. Wilmington City Ry. Co.*, 54 Atl. 746 (Del. Super. Ct.), where it appeared that the plaintiff was engaged in scrubbing and cleaning a summer street car while the trolley pole was in contact with the feed wire, and while so engaged his hand came in contact with the end of a live wire hanging down from the top of the car; that thereby he received an electric shock and was seriously injured. In charging the jury the court directed that "where the employment is dangerous, it is the master's duty, either by general rules or special instructions, to warn and inform his servant of the danger, if by reason of youth or inexperience the servant is unacquainted therewith. The measure of such instructions should be gauged in all cases by such youth or inexperience."

SHANKS V. CITIZENS' GENERAL ELECTRIC CO.

Kentucky; Court of Appeals.

1. INJURY TO LINEMAN BY DEFECTIVE WIRE; ASSUMPTION OF RISK; KNOWLEDGE OF FOREMAN NOT IMPUTED TO EMPLOYEE.—The appellant was in the employ of the appellee as a lineman. He was directed by the foreman of the appellee to go upon a pole of the Louisville Electric Company for the purpose of repairing the wires of the appellee, which he could not do by going upon one of the poles of the appellee. While engaged in his employment on this pole he came in contact with a live wire belonging to the Louisville Company and was severely burned. It appeared that he had knowledge of the danger of his employment and of the insufficiency of the implements which he was using. It also appeared that the foreman of the appellee had been informed by the foreman of the Louisville Electric Light Company that the pole which the appellant went upon was dangerous and that he should keep his men off of it. The appellee's foreman did not give the appellant the information thus obtained. The foreman was, therefore, negligent, notwithstanding the appellant's knowledge of the dangerous character of the work, and the appellee is liable therefor.

Appeal by plaintiff from judgment for defendant. Decided October 29, 1903; reported Ky. Law Rep. —, 76 S. W. 379.

Emory H. Lindenberger and *W. J. O'Conner*, for appellant.

O'Neal & O'Neal, for appellee

Opinion by NUNN, J.:

The appellant appeals from a judgment of the Jefferson Circuit Court on a verdict rendered against him on a peremptory instruction. The contention of appellant is that he was an employee of appellee, working under the orders and directions of a superior by the name of Holt; that they were repairing the electric wires of appellee at a point near Third and Jefferson streets, in the city of Louisville; that near one of the poles of appellee stood a similar pole belonging to the Louisville Electric Light Company, and being unable to make the connection of appellee's wire by remaining on appellee's pole with the implements at hand, the foreman, Holt, ordered and directed this appellant to go over onto the pole of the Louisville Electric Light Company, and to walk out on one of the arms of this pole, where he could reach the wires of the appellee, so as to stretch the slack out of it; that he was able to reach the wire, but could not get the implement which he had for use, called a "come along," to take hold of the wire with the insulation on it; that his superior, Holt, directed him to take his knife and cut off the insulation, which he did, and then clasp it with this implement; that there were electric wires above his head and on the arm near his feet, belonging to the Louisville Company, and in his effort to stretch appellee's wire there was an involuntary movement of one of his feet, which came in contact with one of the wires of the Louisville Company, which was a live wire, and his foot was severely burned; that he knew the position he occupied was a dangerous one, but had no thought of coming in contact with a live wire of the Louisville Company. He further stated the instrument which he had for use—the "come along"—

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was not a proper and safe instrument for such use; that a rope with a knot in it was the proper and safe thing, but which had not been furnished.

This court is at a loss to determine certainly the meaning of the lower court in the bill of exceptions in the use of this language: "The official transcript of the evidence, showing correctly all the objections and exceptions made and taken, and ruling of the court thereon, is filed herewith, as a part of this bill, marked 'Transcript of Testimony.' Such testimony was taken down in shorthand, and subsequently transcribed by the stenographer, and the transcript is a full, accurate, and correct transcript of the testimony in the case, except that it omits a statement which the plaintiff says was made by John Geywitz, a witness in his behalf, to the effect that he warned the defendant's foreman, Holt, that its men would be hurt if he sent them on the pole of the Louisville Electric Light Company at Third and Jefferson streets." There appear in the record the affidavits of John Geywitz, Emory H. Lindenberger, one of the counsel for appellant, C. R. Dinwiddie, and Robert N. Krieger, to the effect that Geywitz gave such testimony on the trial of the action. While it is not clear, we are of the opinion, from the language of the court in the bill of exceptions, that it intended to adopt this statement as a part of the testimony of Geywitz. There was no testimony offered by appellee, for at the end of appellant's testimony there was a peremptory instruction given to find for appellee.

We are of the opinion that the lower court erred in the giving of this peremptory instruction. There was evidence tending to support appellant's claim. In the case of *I. C. R. Co. v. Lanagan*, 76 S. W. 32, the court said: "There are certain risks which a laborer assumes as an incident of his employment. Among these is that of the ordinary negligence of his fellow servants. Although each servant in the common employment is a representative of the master, to the extent that he is acting within the scope of his duties, yet for many kinds of ordinary neglect towards his fellow servants the master may not be liable for resulting injuries. However, there are certain duties which the master owes to his servants that

are primary and personal in their nature, and which he may not delegate to another, so as to escape liability for their nonperformance. Among these, he owes to his servants to furnish them a reasonably safe place to do their work, and must furnish them reasonably safe tools and appliances with which to do it. . . . So, where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a simple neglect by such servant the master is responsible as though he acted in person." The appellee contends that appellant's own testimony shows that he was aware of the danger incident to his work, and of the defective and insufficient appliances furnished him with which to do the work, and for these reasons the court was right in giving the peremptory instruction. Upon this subject the court, in the same case, said: "We understand the rule on this subject to be that if the danger or risk is such that a prudent man would have refused to do the work under the circumstances, because of the danger, then the servant will act at his peril in undertaking it. But when the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening, or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate or the machinery safe, then the servant has the right to rely upon the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement, or who obeys his positive direction, that, if he (the master) is in error as to the safety, he would indemnify the obedient servant against the consequences." If the foreman of the Louisville Electric Light Company had given Holt, the foreman of appellee, information that this pole at the corner of Third and Jefferson was dangerous, and told him to keep his men off of it, for they might get hurt, then it was certainly negligence for appellee's foreman to direct appellant to get upon this

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pole to perform labor, and especially without giving him the information he had received with reference thereto.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

Liability for injury to Employee of Electric Company.

1. In general.
2. Special dangers as to employment pertaining to electrical systems.
 - a. General rule.
 - b. Use of rubber gloves.
 - c. Duty to instruct.
3. Latent defects in appliances.
 - a. Duty of employer.
 - b. Injuries caused by defective insulation.
 - c. Injuries caused by latent defects.
4. Selection of appliances by employee.

1. In general.—It is the duty of an electrical company to exercise reasonable care to protect its employees from injury caused by contact with electric wires. In the exercise of such care it becomes the duty of the company to furnish its employees with safe appliances and to keep the same in reasonable repair, and also to furnish its employees with a reasonably safe place in which to perform their duties. As held in the case of *Essex County Elec. Co. v. Kelly*, 5 Am. Electl. Cas. 364, 57 N. J. L. 100, 29 Atl. 427, the duty of a master to a servant in his employ is to take reasonable care and precaution not to subject the servant to other or greater dangers than those which are obvious or naturally incident to the employment, the risk of which the servant takes by accepting employment; the master must take reasonable care to furnish tools and appliances with which, and to have the places on or about which, the servant is employed to work, reasonably safe for the work.

But the duty of any employer to protect and care for his employee is subject to the well settled doctrine that the employee, by accepting employment, consents to take the risk of all dangers obviously or naturally incident to such employment.

2. Special dangers as to employment pertaining to electrical systems.

(a) *General rule.*—An electric company does not insure the safety of its employees. The risks of employment pertaining to the use, operation and maintenance of electric wires and appliances is commonly known to everyone. A person entering the employment of an electric company will then be held subject to the general rule that the known and ordinary risks of such employment are assumed by him. *Flood v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603, 30 N. E. 196. The rule as stated by Mr. Joyce (Joyce on

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Electric Law, sec. 652), is as follows: "Electrical companies do not insure the safety of their employees, but the latter are subject to the general rule that one who chooses to enter into an employment, involving danger of personal injury, which the master himself might have avoided, assumes all risks incident to the employment and which are known to him, or are either plain and obvious, and which he has no reason to expect will be counteracted or removed, and that the employee cannot recover for injuries resulting from such dangers." Citing *McGorty v. Southern N. E. Telephone Co.*, 69 Conn. 635, 38 Atl. 359; *Soutar v. International Elec. Co.*, 68 Minn. 18, 70 N. W. 796; *W. U. Tel. Co. v. McMullen*, 6 Am. Electl. Cas. 338, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351. In the case last cited it was held that a servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

(b) *Use of rubber gloves.*—An experienced lineman, who, discarding the rubber gloves furnished him by an electric light company employing him, touches with his bare hands the obviously uninsulated ends of live wires for the purpose of connecting them, assumes the risks of his employment, and damages for his death thus caused cannot be recovered of the company. *Junior v. Mo. Elec. L. & P. Co.*, 5 Am. Electl. Cas. 369, 127 Mo. 79, 29 S. W. 988. The court, in summing up the facts appearing in this case, said: "It seems very clear that this misfortune befell the decedent through his neglect to use the rubber gloves provided for this very work. He assumed the risk of handling these wires charged with electricity. The employment was very hazardous and inherently dangerous in its very nature, but he undertook it with knowledge of its dangers, and he was bound to exercise care to avoid the consequences. The evidence shows most conclusively that, by his own neglect of the means furnished him by his employer, he brought his hands in contact with the wires and lost his life." But in the case of *Harroun v. Brush Elec. L. Co.*, 6 Am. Electl. Cas. 351, 12 N. Y. App. Div. 126, 42 N. Y. Supp. 716, it appeared that the plaintiff's intestate, a lamp trimmer, was killed by an electric shock while engaged in trimming a street lamp. It was held that his failure to wear rubber gloves while engaged in such work was not necessarily conclusive upon the question of contributory negligence.

(c) *Duty to instruct.*—Dangers that are the result of common knowledge which can readily be seen by common observation, the servant assumes the risk of; but when the danger to be avoided requires a knowledge of scientific facts, an ordinary servant is not presumed to have knowledge of them and it is the duty of the master knowing them to inform the servant in respect thereto. *Chicago Edison Co. v. Hudson*, 16 Ill. App. 639. In the case of *Myhan v. Louisiana Elec. L. & P. Co.*, 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, it was held that an electric light company is bound specially to warn its employee of the nature of the danger arising from contact with its exposed wires, and it will not be excused in case of injury unless it

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proves that the employee well knew the danger, and, notwithstanding, exposed himself willingly and deliberately to it. The presumption is that such an employee was ignorant of the danger arising from the contact, and in case of injury the burden of positive proof is on the company to show notice and knowledge of the danger on the part of the employee. In the case of *Carr v. Manchester Elec. Co.*, 7 Am. Electl. Cas. 746, 70 N. H. 308, 48 Atl. 286, it was held that an electric light company was not chargeable with negligence in failing to inform its employee that there was greater danger in handling electric wires in wet weather than in dry.

3. Latent defects in appliances.

(a) *Duty of employer.*—It being conceded that employment in connection with electric devices is dangerous, the employer is legally held to the greatest care and diligence in the selection of the necessary materials and appliances and in everything else calculated to insure the safety of the employee in the prosecution of his work. *Clarain v. W. U. Tel. Co.*, 2 Am. Electl. Cas. 344, 40 La. Ann. 178; *Railroad Co. v. Derby*, 14 How. (U. S.) 486; *Colorado Elec. Co. v. Lubbers*, 2 Am. Electl. Cas. 361, 11 Colo. 505, 19 Pac. 479. It is indispensable to the employer's exemption from liability to his servants for the consequences of risks thus incurred, that he should be free from negligence. He must furnish the servant with the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury result, he is liable to the servant as he would be to a stranger.

(b) *Injuries caused by defective insulation.*—In view of the subtle and dangerous nature of electricity, an employer in using it is bound to the exercise of a very high degree of care for the protection of his employees against injury from such use. The accidental crossing or contact of wires, caused by their sagging or breaking, or by high winds and other causes, and the consequent charging of the wire carrying a light current with a dangerous current from a more heavily charged wire, is of sufficiently frequent occurrence to suggest to an employer the liability of accident from such a cause, and to require him to take precautions against injury to his employees thereby. *Moran v. Corliss Steam Engine Co.*, 7 Am. Electl. Cas. 743, 21 R. I. 386, 43 Atl. 874. And in the case of *Kraatz v. Brush Elec. L. Co.*, 3 Am. Electl. Cas. 491, 82 Mich. 457, 46 N. W. 787, it was held that the stringing of wires by an electric light company so that the wires of one circuit cross another, and so that a slight sagging of one wire will bring the two in contact, thus wearing off the insulation and leaving the wires bare, and maintaining one circuit as a live one, while employees are set at work handling with bare hands the wires of the dead circuit so crossing the wires of the live one, is plain and unexcusable negligence.

The rule has been stated in respect to the use of electricity for the operation of electric railways as follows: "When the Legislature authorizes a corporation to use such an agency as electricity in the public streets, the law implies the duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency,

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for providing against all dangers incident to its use, and holds it accountable for an injury to any person due to the neglect of that duty, whether the person injured is or is not one of its own employees." *McAdam v. Central Ry. Elec. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445; 35 Atl. 341. In the case of *Mitchell v. Raleigh Elect. Co.*, 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801, the facts were as follows: The plaintiff's intestate was in the employ of a telephone company, and was assisting in stringing a wire upon the poles of said company. Such poles were some ten feet higher than those of the defendant. In letting out the wire from one telephone pole to another it came in contact with an electric light wire and the plaintiff's intestate was fatally shocked. The light wire was not insulated as required by a municipal ordinance. The electric company was held negligent. The court said: "The evidence in the case at bar shows that defendant's wires were strung on poles along the same street with those of the Bell Telephone Co. At places, as in this case, one set of wires diagonally crossed the other at a distance of only about ten feet. Each had a common right, and it was the duty of each to exercise all reasonable precautions for the prevention of injury to the servants who may be sent there in the performance of duty. Each is bound to know that the servants of the other may come in contact with its wires."

(c) *Injuries caused by latent defects.*—A servant is chargeable with knowledge of those defects only that are open to his observation. *Missouri Pacific Ry. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. 838; *Denham v. Trinity County Light Co.*, 73 Tex. 78, 11 S. W. 151. An employee is not bound to inquire as to latent, but only patent, defects in machinery and may assume that this inquiry has been made by the employer, upon whom the duty devolves; and although the servant may know of the defects, this will not defeat his claim for damages for injury, unless it be shown that he knew that the defects were dangerous. *Myhan v. Louisiana Elec. L. & P. Co.*, 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436. In the case of *Essex County Elec. Co. v. Kelly*, 5 Am. Electl. Cas. 360, 57 N. J. L. 100, 29 Atl. 427, it was held that when a servant receives an injury from a latent defect in appliances furnished to him by his employer to be used by him as a lineman, evidence to establish the master's liability for such defect must justify the inference that he either knew or by the exercise of the care required of him, might have known, of the defect; but he will not be responsible for a defect which the most careful scrutiny would not have disclosed.

4. *Selection of appliances by employee.*—Where the employee who had been long employed and carefully instructed as to his duties and the dangers incident thereto, was killed while in the discharge of his duty by the passage of an electric current through his body, caused by the use by him of a defective "shunt-cord," and it appeared that the defects in such device were patent, and that the employee had selected it from several others at the office of the employer, leaving a number which were perfect, it was held that the company was guilty of no negligence, but that the employee himself was negligent, and no recovery could be had for his death. *Piedmont Elec. Ill. Co. v. Patterson's Adm'x*, 2 Am. Electl. Cas. 350, 84 Va. 747, 6 S. E. 4.

New Omaha Thomson-Houston Electric Light Co. v. Dent.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO. v. DENT.

Nebraska; Supreme Court.

1. **INJURY TO EMPLOYEE; CONTRIBUTORY NEGLIGENCE.**—In an action for negligence, when contributory negligence is relied upon as a defense, the burden of proof is upon the defendant to establish such defense, unless contributory negligence is disclosed by the petition, or by the evidence introduced by the plaintiff in making his case. Where the evidence on the question either of negligence or contributory negligence is of such a character that reasonable minds might honestly differ as to the inference to be drawn therefrom as to such questions, a finding either way thereon cannot be said to be insufficiently supported by the evidence.
2. **DUTY TO PROTECT EMPLOYEE; NOTICE OF DEFECT.**—An employee has a right to assume that his employer has taken due precautions to insure his safety, and that the tools, appliances and material furnished by the employer are reasonably safe. Aliter, where the employee has notice of the defective condition of such tools, appliances or material, or of facts sufficient to put a man of ordinary prudence on inquiry.
3. **REFUSAL TO INSTRUCT.**—The refusal to give an instruction, proper in form, is not ground for reversal, where such instruction is based on a fact the existence of which the jury negative by a special finding supported by the evidence.

(Syllabus by the court.)

Commissioners' opinion. Department No. 3. Error brought by defendant from judgment for plaintiff. Decided March 4, 1903; reported 93 N. W. 966.

Rich & Clapp, for plaintiff in error.

T. J. Mahoney, for defendant in error.

Opinion by ALBERT, C.:

On the 2d day of August, 1900, Thomas B. Dent commenced work as a lineman for the New Omaha Thomson-Houston Electric Light Company, which at that time owned and operated an electric light system in the city of Omaha. On the same day, in the course of his employment, he was engaged in fastening wires on insulators on the cross-bars of a pole, upon which a number of wires were strung, radiating therefrom to the four points of the

compass. The wires were strung on four sides of the pole, and wires of different polarity were on each of the four sides. The insulating material on the wires was old and rotten, and, while Dent was fastening one of the wires to the glass insulator, the insulating material on the wires broke or cracked on the side of the glass insulator opposite to him, as he supported himself at work on the pole at some distance from the ground. In attempting to fasten another wire he used a pair of iron or steel pliers to handle it. While thus engaged his elbow came in contact with the other wire at the point where the insulation was cracked or broken, and, the wires being alive and of different polarity, the current passed through his body and killed him. The widow of the deceased was appointed administratrix of his estate, and brought this action against the electric light company for damages on account of the death of her husband, charging that death was caused by the negligence of the defendant company. The petition contains three specifications of negligence: (1) The use of wires on which the insulation had become old and unsafe; (2) placing wires of opposite polarity on the same side of the poles upon which the deceased met his death; and (3) not cutting off the current from wires on which the deceased was at work when killed. The answer denied any and all negligence on the part of the defendant, and charges contributory negligence on the part of the deceased. The reply is a general denial. The jury found for the plaintiff, and judgment was given accordingly. The defendant brings error.

The court, among other things, instructed the jury as follows: "(10) An employee is under the same legal duty to care for his own safety that his employer is to provide for his protection from accidents. It was the duty of James R. Dent, while in the performance of his work, as a lineman, to exercise ordinary and reasonable care and caution, under the circumstances of his situation, to avoid electric shocks and consequent death. While he had a right to assume that the defendant had used ordinary care and diligence to make it reasonably safe for him to work on live wires, yet he was not at liberty to close his eyes to defects of insulation

which were open and obvious, or which he might have seen by using ordinary and reasonable care and caution. If you believe from the preponderance of the evidence that the insulation on wire called No. 2 was broken by said Dent when he tied said wire around the glass insulator, and if you further find from the preponderance of the evidence that said break in the insulating material on said wire was open and obvious to said Dent, or that he ought to have seen it by an exercise of ordinary care on his part before he attempted to tie on the next wire, then your verdict must be for the defendant, even though defendant might have been negligent."

The defendant insists that the verdict is contrary to the foregoing instruction, because the evidence is undisputed that the break or crack in the insulation, which permitted the deceased's arm to come in contact with the wire, was on the top of the turn in the wire, and in full sight, so that, if he did not see it, he should have seen it, and protected himself against it. But there is sufficient evidence to sustain a finding that the insulation on this wire was about ten years old; that the ordinary life of insulation is from three to four years; that the use of such wire by the defendant was negligence; and that, if insulation had been reasonably good, the break would not have occurred. Now, while it is true that the employee assumes the ordinary risks incident to his employment, it is also true that he has a right to assume that his employer has taken due precautions to insure his safety. The deceased was at work on a pole some distance from the ground; his feet rested on a cross-bar, and he maintained his position by means of a supporting belt; the wire on which the break occurred was about opposite his shoulders, and another wire passed between his body and the pole. In order to see this break he would have had to lean forward, and look around or over the glass insulator on which the wire was fastened. The break of the insulation, therefore, was not obvious in the sense that it was directly within range of his vision. As before stated, he had the right to assume that his employer had taken due precautions to insure his safety. Acting on that assumption, he was not required to guard against

dangers arising from the use of defective material or appliances, and it cannot be imputed to him for negligence that he failed to look for a break in the insulation, which would not have occurred had his employer taken due precautions to insure the safety of its employees.

But it is urged that he knew the insulation was defective, because he had called attention to it in the forenoon, and had been told that it could not be trusted. But the evidence on this point is that, at another point on the line, and some hours before the accident, the deceased had called attention to the fact that the insulating material was hanging in strips from the wire at this point, and was there told that it was defective and unsafe. But the defect at that point was patent, and of a character to arrest the attention of ordinary persons, because, as before stated, it was hanging in strips from the wires. But there is no evidence that the insulating material on the wires at the point where the accident occurred was obviously defective, or that there was anything about it to indicate to a person not an expert that it was old or unsafe. It is contended, however, that the deceased was an experienced man, and must have known, from the appearance of the insulating material on the wire on which he was engaged, that it was old and defective. The evidence does show that the deceased was an experienced lineman, but it falls far short of showing that his experience was of such a character as to enable him to judge of the age or quality of insulating material. In fact, it does not appear that he had any experience with insulated wires, or wires carrying dangerous currents. His experience, so far as is disclosed from the evidence, was confined to telephone and telegraph lines. Neither the pleadings of the plaintiff, nor the evidence in support thereof, disclosed any negligence on the part of the deceased. Therefore, on the question of contributory negligence, the burden of proof was upon the defendant. That being true, in the face of an adverse verdict, the complaint that a finding involved therein is not sustained by sufficient evidence is unfounded, unless the evidence on that point is of such a character that the only reasonable inference to be drawn therefrom is that the negligence of the deceased directly con-

tributed to the injury. The evidence before us is not of that character.

The defendant contends that the second and third specifications of negligence in the petition are not sustained by the evidence. As to the third, the court directed a finding in favor of the defendant, so it requires no further notice. As to the second, there is evidence sufficient to sustain a finding that, had only wires of the same polarity been strung on the same side of the pole, the accident would not have occurred. It is true there is a substantial conflict in the evidence as to whether it would have been practicable or advantageous to put only wires of the same polarity on the same side of the pole. But the gist of the action is whether the defendant did, or omitted to do, that which a man of ordinary care and prudence, under like circumstances, having a due regard for the safety of his employees, would not have done or omitted, and whether the injury complained of was the proximate result of such act or omission. Such questions on the record presented are questions of fact, and, having been resolved against the defendant on conflicting evidence, the findings should not be disturbed.

The defendant complains of the refusal of the court to give the following instruction: "The jury are instructed that if the insulation upon the wires on the pole upon which Dent was injured, which wires have been designated on the testimony as Nos. 2 and 3, was rotten and brittle, and for that reason liable to crack or break upon bending around the glass insulators on the arms, and this fact was known to Dent when he undertook to attach the wires Nos. 2 and 3, and with this knowledge Dent undertook, without protest to this defendant, to attach said wires to said insulators, the plaintiff herein cannot complain as to the condition of the wires as to insulation, and as to that issue you will find for the defendant. By knowledge is meant not only what Dent actually knew, but what, from the knowledge and information on that subject he possessed, either from experience, observation, or the warnings or cautions of creditable persons, he ought to have known." This instruction is practically the same as the paragraph hereinbefore

quoted, given by the court on its own motion, consequently it was not error to refuse to give the one in question.

The defendant tendered instructions to the effect that if the deceased knew that the wires with and among which he was working were live wires, and proceeded to his work without protest, the jury should find for the defendant as to the third specification of negligence. These instructions were refused, and rightly, because, as we have seen, the court of its own motion directed the jury to find against the plaintiff as to that specification.

Other instructions were tendered to the effect that if the deceased knew that wires of different polarity were strung on the same sides of the pole on which he was working, and proceeded with his work without protest, the jury should find for the defendant as to the second specification of negligence. The court refused to give these instructions, but submitted a special interrogatory to the jury as to whether the deceased knew that wires of different polarity were strung on the same sides of the pole. The jury answered that interrogatory in the negative, and their finding on that point is sufficiently sustained by the evidence. The jury having specially found that the deceased did not know such fact, the refusal of the court to give the instructions covering that hypothesis was error without prejudice.

Numerous other errors are assigned, but the foregoing shows only the assignments argued.

It is recommended that the judgment of the District Court be affirmed.

AMES and DUFFIE, CC., concur.

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NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO. v.
ROMBOLD.

Nebraska; Supreme Court.

1. **NEGLIGENCE INFERRED FROM DEFECTIVE INSULATION.**—Where evidence tended to show that a lineman of an electric lighting company was injured by inadvertently passing between a pair of exposed splices situated within two feet of a post, on wires carrying a strong current of electricity, and that the lack of insulation had continued during time of lineman's employment, *held*, not error to tell the jury that failure to make reasonable effort to provide a safe working place for the employee, and consequent negligence, might be inferred from the mere fact that the splices were not insulated, if the jury found that reasonable care would have required their insulation.
2. **DUE CARE OF LINEMAN.**—Whether or not due care on the lineman's part required that he see and avoid contact with the exposed splices was properly left to the jury.
3. **DUTY TO INSPECT; ASSUMPTION OF RISK.**—The evidence showing that no inspectors were employed, and that the lineman was instructed to repair or report defects of insulation observed by him, the question as to whether or not he had assumed the risk from this defect of insulation was properly left to the jury.
(Syllabus by the Court.)

Error brought by defendant from judgment for plaintiff. Decided March 4, 1903; reported 93 N. W. 966.

Greene, Breckenridge & Kinsler and *W. W. Morsman*, for plaintiff in error.

T. J. Mahoney, Crane, Crane & Erwin, and *J. J. Boucher*, for defendant in error.

Opinion by HASTINGS, C.:

June 12, 1899, plaintiff below, Rombold, commenced his action against the New Omaha Thomson-Houston Electric Light Company to recover alleged damages in the sum of \$25,000 for an injury received by him while in defendant's service, as he alleged, in the following manner: That March 22, 1898, he entered the company's employ as lineman, it being his duty under defendant's

direction to erect poles, place cross-bars on them, and string wires in the streets of Omaha wherever and whenever defendant directed; that he continued in the company's employ up to July 1, 1898, and on that day was stringing wires on poles and cross-bars at Jones street, between Fourth and Fifth; that he was directed to climb to the top of the pole, about 45 feet, for the purpose of stringing a wire upon the top cross-arm; that there were eight cross-arms about 20 inches apart attached to the pole, and on each arm electric and telephone wires to the number of from 4 to 6, the wires being about 16 inches apart; that there were 26 electric wires covered with insulating material; that on the second cross-arm from the top were two wires 14 inches apart, known as No. 4, which were insulated, and charged with a heavy current of electricity; that these wires were spliced at a distance of about 2 feet west from the cross-arm, and so negligently that the ends of said wires extended out at right angles to a distance of one inch and beyond the insulation; that it was defendant's duty to cover all splices with tape, prepared for that purpose, to protect employes from contact with any wires not insulated and from receiving injuries in that manner; that these splices were not taped, and remained without any covering whatever; that plaintiff went up on the east side of the cross-arms, and to the north of the pole between these two wires, completed the stringing of the wire, started to descend on the west side of said cross-arm, between the same wires, until he came to a point between the said splices, and there, without any fault on plaintiff's part, his right arm came in contact with the uncovered splice of the wire next to the pole, and at the same instant the back of his left shoulder came in contact with the uncovered splice on the second wire; that this permitted a "short circuit" between the wires through the body of the plaintiff as a conductor, and gave plaintiff an electric shock which overpowered him, caused him to lose his hold, and threw him to the ground, breaking his left foot and right ankle; that as a result of the injury it became necessary to amputate his right foot on May 25, 1899; that he was permanently injured, and rendered wholly unable to perform any labor, and suffered great pain, to his dam-

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age in the sum of \$25,000, and that he expended, for medicine, care, and hospital services, \$600.

The answer admits defendant is a corporation lighting the streets of Omaha by electricity, and maintaining a plant for that purpose; admits the employment of the plaintiff up to July 1, 1898, as alleged; and denies plaintiff's remaining allegations. The answer also alleges that plaintiff's employment required him to go among defendant's "live wires;" that his work required great care and attention on account of dangerous electricity, as plaintiff well knew, and that while so employed he received an electric shock which caused him to fall a considerable distance to the ground; but says that it was not negligent toward the plaintiff, and that his fall and any other injury were occasioned entirely by the careless and negligent manner in which he performed his work under conditions all of which he well knew.

The answer also alleges that on October 12, 1898, plaintiff demanded reimbursement for his damage; that defendant, while denying liability, paid him \$325, and received from him a release in full in the following terms:

"Received of New Omaha Thomson-Houston Electric Light Co. this twelfth day of October, 1898, the sum of three hundred and twenty-five dollars in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the first day of July, 1898, while in the employment of the above. \$325.00. J. C. Rombold. Witness: W. F. White. Address: Omaha, Nebr."

—and that this release was intended to and did cover all the plaintiff's claim in this action.

The plaintiff's reply denied all this answer except so far as it admitted matter in his petition; he alleged that the defendant's vice-president and general manager, White, represented to him that the defendant had a contract of insurance for the benefit of its employees; represented that the insurance company was required to and did pay for injuries received by defendant's employees, the amount of expenses incurred for medicine, doctor's

service, and hospital fees; stated that the \$325 was not in payment of defendant's liability, but a payment to the employe regardless of the liability of defendant, and its receipt would be no discharge of the defendant; and stated further that such payment was simply to reimburse plaintiff for his expenses; alleged that White agreed to assist plaintiff to get a speedy and favorable settlement with the insurance company, and agreed that, in addition to whatever the latter should pay, defendant would in April following pay plaintiff \$500, and give him employment so long as he saw fit to retain it; that at defendant's instance plaintiff went up to its office to meet the representative of the insurance company and make a settlement; that an agreement was entered into whereby the insurance company was to pay plaintiff \$325 as his expenses incurred by reason of his injuries; that the insurance company's representative paid \$325, and that said sum was received by plaintiff on account of expenses alone; that the question of damages was not discussed during the negotiations for the receipt; that plaintiff did not read the receipt, but the insurance company's agent pretended to read it, and misread it so that from the reading and representations plaintiff understood that it was simply a receipt for his expenses, and had nothing to do with any claim for damages, and in reliance upon such understanding and representations he signed the receipt; that White, in promising that defendant should pay \$500 and employ plaintiff, acted without authority, and without intention on White's part to bind defendant, and without intention that defendant should pay plaintiff any such sum, and with intention to defraud and deceive plaintiff, who believed in and relied upon the honesty and good faith of White, and believed fully all the statements made by him, and was thus induced to sign said receipt without a personal examination of it; that at the time of signing such receipt he was suffering intensely with pain and ill with fever, not in his right mind, and in no condition to know what he was doing or to make a contract, and that he never did in fact agree to any settlement of his damages.

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Under these issues trial was had, and verdict returned for \$15,000. A motion for a new trial was overruled, and from a judgment on the verdict the defendant brings error.

Two briefs have been filed on behalf of the defendant company. The first, at page 4, is summarized by its writer as follows:

"(1) The company did not owe to the plaintiff the duty of inspecting the wires and making repairs in order that he might have a safe place to work at the place where this accident occurred. (2) It was the duty of the plaintiff to himself observe the condition of the wires where he was working, and avoid contact with them, and his failure to do so, shown by his own testimony, defeats a recovery. (3) The court below erred in the fifth and eighth paragraphs of the charge, and in refusing to direct a jury to render a verdict for the defendant, on defendant's motion, upon the whole of the evidence."

The other brief states the claims of defendant as follows:

"(1) Assuming that the plaintiff was injured in the manner he describes, can it be said that his injuries were caused by the failure of the defendant to perform any duty it owed him as a regular lineman engaged in its service? (2) Assuming, again, that at the time of the accident the condition of the number 4 wires was the same as the plaintiff found them in October following, was not the hazard incident to their condition, the same being open and obvious to even a casual and inexperienced observer, one of the assumed risks of the plaintiff's employment? (3) Assuming, again, it was the duty of the defendant to have the wires properly taped before sending the plaintiff to work near them, and that it had neglected to perform this duty, was not the danger incident thereto an open and obvious one, which the plaintiff was bound to see and guard against, and his failure to do so the proximate cause of his injuries? (4) Is the plaintiff not bound by the terms of the settlement, evidenced by the written release, signed by him? (5) Are not the damages excessive?"

Plaintiff contends on page 7 of his brief:

"(1) That the evidence sustains the finding of the jury that the defective condition alleged was in existence at the time of the injury. (2) That the defendant is by law held to exercise ordinary and reasonable care to provide a safe place for its employees to perform their duties; that this reasonable and ordinary care required it to tape all splices and joints in insulated wires, and that in not having done so the defendant was guilty of negligence. (3) That plaintiff did not assume the risk of injury from contact with the untaped splices and joints, and, in any event, whether or not he did so was for the jury. (4) That it cannot be said, as a matter of law, that plaintiff

was guilty of contributory negligence in failing to see the untaped splices, and, consequently, whether or not he was guilty of it was for the jury. (5) The release signed by plaintiff was obtained by fraud, and is not binding upon him so as to defeat a recovery."

It is clear from the examination of these briefs and from the record that the question in this case is upon the instructions. If the view of the law adopted by the trial court is sound, there is evidence to support the findings of the jury upon each disputed question of fact. These are practically two: (1) Were the uninsulated splices on the wires July 1, 1898, and were they the cause of plaintiff's fall? (2) Was the receipt in full fraudulently obtained, and without an agreement for settlement?

As to the first, there is plaintiff's statement as to the manner of his fall; that he was doubled up by a severe shock, just as his shoulders were passing between these two wires, strong enough to draw his feet from the lower cross-bar on which they rested. He also says that his right arm and the back of his left shoulder was burned by the electric discharge. As he went down between these wires with his face towards the pole, these exposed points, if they were then there, would strike him naturally at those places. He says that on October 1st or 2d after the accident he went to the place and found the exposed splices. They seem to have remained there as late as the following spring. The attending physician testifies to the presence of burns, apparently from electrical contact, on plaintiff's shoulder and back, at his first examination after the accident. The line foreman for defendant testifies that he examined the place of the accident, with a view to ascertain its cause, immediately after it, and saw nothing of the splices, and he thinks he would have seen them if they had been there. There is other testimony to the same effect. But the testimony goes to show that these splices were put on at some time to furnish electricity to a consumer, and when the service was discontinued the service wires were cut away, leaving the splices and short projecting ends exposed. The plaintiff testifies that he had passed by this place and was acquainted with the line at that point, and during his employment with defendant there had been no service connec-

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tion there. There seems to have been none afterwards, so far as the evidence shows. Defendant seems not to have attempted to show when the service wires were cut away, or the history of these splices in any way. It contents itself with denying that they were there on July 1, 1898. It would seem clear that there was evidence for the jury to consider as to whether or not the exposed points of these splices were there July 1st, and were the cause of plaintiff's shock. Defendant urges that the first positive evidence of their existence dates from October 1st, three months after the accident, and this is too remote to be considered. But where there is absolutely nothing to show that any service connection at this point had been either made or cut during that time, and plaintiff had been incapable of getting to the place sooner than that, there seems no error in admitting this evidence.

As to the other question of fact, defendant's counsel do not claim that there is no evidence of deceit on the part of its manager, White, and of the insurance company's agent, Gilbert. They do not claim that there is no evidence that the signing of the receipt in full was in consequence of such deceit. They say, however, that there was no fiduciary relation between plaintiff and either White or Gilbert; that plaintiff had full opportunity, on his own story, to read the instrument, and if he did not do so, but negligently signed, he is estopped. They also claim that the evidence of plaintiff alone as to the fraud in procuring his signature to the receipt is not enough to overcome that of the paper itself, which was executed in duplicate, and the testimony of White and Gilbert in denial of his statements. It seems clear, however, that plaintiff was somewhat corroborated by other witnesses as to negotiations with White touching his expenses, and by the circumstances of the case. If the trial court was correct in telling the jury as to the effect to be given to the statements of White and Gilbert to plaintiff, if the jury should find them to have been made as plaintiff testified they were, then it must be conceded that the verdict—that this receipt constituted no valid defense—is supported by evidence.

The dispute therefore turns upon the instructions given by the trial court, and as to these the question is rather in reference to

the application of principles, than concerning principles themselves, of law involved in the case. The question raised as to the sufficiency of the evidence of negligence on defendant's part turns upon the trial court's application of the doctrine of an absolute duty resting on the employer to make reasonable efforts towards providing a safe place for the employee to work.

The eighth instruction was in the following terms:

"It was the duty of the defendant company to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among electric light wires. If such a degree of care and caution required said wires to be insulated, then it was negligence in the defendant to permit said wires, or a wire or part of a wire, to be without proper insulation, and thereby subject its linemen to risk of injury; and if, by reason of a want of such insulation, a lineman, without fault on his part, suffers injuries, then the negligence of the company would be actionable, and the injured lineman could recover proper damages."

This instruction told the jury that it was competent for them, if they concluded that "reasonable care" required defendant to insulate its wires, to find negligence from the simple fact that the wires were not insulated. A complaint is made that this instruction assumes as an established fact that the wires were not insulated when the accident happened. It is hardly open to this criticism. It of course assumes that the wires may not have been insulated; but does not necessarily assume anything more than that. The next instruction explicitly told the jury that, to recover, plaintiff must show by a preponderance of the evidence that the untaped splices were on the wires when he was hurt, and caused his shock and injury, and that the fact that they were found there some months afterwards would not alone warrant a finding that they were there on July 1st. This instruction 8 distinctly told the jury that if they thought reasonable care and caution on defendant's part required the taping of these splices, and plaintiff was hurt, without fault on his part, because they were not taped, he could recover. That is, the trial court held that it would not say that an absolute duty to insulate these wires at that point rested on the defendant, or that it did not so rest. It left the decision of that question to the jury, under the evidence. Counsel complain that

the wording of the instruction led the jury to believe that the court meant to say that an absolute duty to insulate the splices rested on defendant. Such is not the meaning of the words, and if the distinguished counsel of defendant desired a clearer statement of the proposition they should have furnished it. In truth, their contention was then, and is now, that, under the facts in this case, no duty to this plaintiff on defendant's part to insulate these wires existed. They said then, and say now, that defendant was relying upon plaintiff and his fellow linemen to do just this work of insulating, and, if he and they did not do it, they had no right to complain of the consequences. The evidence is that there were no inspectors of work of this kind other than the linemen and their foreman. The latter testified that the duty of finding and repairing such defects rested upon the lineman who first went up the pole; that if any such defects were found the lineman should repair them at once, if he could, and, if not, report them. Plaintiff testified that no duty of inspection rested upon him, but admitted that if he saw such a place his instructions were to tape it or report it, and that there were no inspectors of the line other than the linemen themselves. He also testified, as has been stated, that no work on the line at this point had been done while he was with the company. He stated, too, that these were the only untaped splices he ever found on the lines. There was no plea, and there is now no claim, that he was injured by a fellow servant's negligence. Under these circumstances the trial court left the question as to whether plaintiff assumed the risk to the jury, as he had done the question as to whether leaving the splices untaped was negligence on defendant's part. This was done by instructions Nos. 5 and 6, as follows:

"When the plaintiff entered the employment of the defendant he assumed all of the ordinary and usual risks incident to the work that he was hired to do; but he did not assume any risk of which he had no knowledge, and which was due to the negligence of the defendant. In going about and performing his work, the plaintiff had the right to assume that the defendant had exercised reasonable care to furnish him a reasonably safe working place, and he was not required to suspect that the defendant had been guilty of negligence, or to make any such investigation or inspection as would be

prompted only by the suspicion that the defendant had omitted to perform its duty.

"If you believe, from the preponderance of the evidence, that the plaintiff was injured as alleged in his petition, and that said injuries were the result of a risk usual and incident to the work of a lineman, and not to the negligence of the defendant alone, your verdict must be for the defendant; but if you do not find that his accident was the result of a risk assumed by him when he engaged in said work as a lineman for the defendant, then you will proceed to examine the evidence, and determine therefrom whether or not said accident is attributable to the negligence of the plaintiff or of the defendant, or both, or neither."

That is to say, the jury were told to determine whether this risk from these untaped splices was one which the plaintiff assumed when he undertook the work, and as to which he was expected to look out for himself, or whether it was, as he claimed, the only instance of uninsulated splices on the line, and a risk which reasonable care on the defendant's part would and should have prevented.

Plaintiff urges that assumption of the risk by him is not pleaded, and cites *Union Stock Yards Co. v. Goodwin*, 57 Neb. 188, 77 N. W. 357. That case holds that the company could get no advantage from assumption of risk on Goodwin's part by his continuing to work with knowledge of a rule that loaded cars were to be taken to the chutes without inspection, because no such assumption of the risk was pleaded. It is contended that in this case the only issues raised are denial of the untaped splices and settlement, and that no assertion is made that plaintiff assumed the risk. No exception, however, was taken by plaintiff to instruction 5, and it is clear that the trial was conducted by both parties under the theory that the plaintiff assumed the ordinary risks incident to his employment, and that these could be shown. The jury, however, found that this one from untaped splices was not among them, but was the result of his employer's neglect. The trial court evidently took the view that it was at least possible for impartial and reasonable jurors to take the view that the exposed conditions of these wires was due to the employer's neglect of proper precautions for the employee's safety, and that the latter had no knowledge of any such danger from an untaped splice, and therefore did not assume it. To the

contention of defendant that, because it was plaintiff's duty to look for this defect and remedy it, therefore he is chargeable with knowledge of it and assumed all risk from it, the reply is that the evidence does not show any such duty of inspection; that plaintiff is simply a lineman; and that the most which the evidence shows is that he was charged with the duty of repairing or reporting structural defects which came under his observation. We are not prepared to say that, under this evidence, the trial court was wrong either in leaving to the jury the question as to whether exposed splices might constitute negligence, or in submitting the question as to plaintiff's assuming the risk.

The question as to contributory negligence is urged at length. Defendant claims that these exposed splices constituted so obvious a danger upon two wires, which the lineman must have known, from the fact that they were both spliced, to be corresponding positive and negative wires of a circuit, that to go between them without any attention to the insulation was foolhardiness. It appears that the linemen were instructed as to the danger of a "short circuit" between positive and negative wires, but it does not clearly appear that there was anything unusual or out of the ordinary in the manner in which plaintiff in this instance performed his work. If the exposed splices were there on July 1st, they seem to have escaped the foreman's notice when he was looking for the cause of the accident. There was some testimony tending to show that different wires were paired as positive and negative at different times, and that workmen depended upon the insulation.

Counsel for plaintiff claims that there is no pleading of contributory negligence, and therefore, if there was any, it cannot avail the defendant. In this again we find that counsel took no exceptions to the instruction in which this question was submitted to the jury. They treated this answer, with its allegations of plaintiff's negligence and denial of any on defendant's part, as a plea of contributory negligence, and permitted the court to so instruct without exception. They cannot now claim this issue is not in the case. If the evidence of his starting down between these wires, with the exposed splices there, is conclusive proof of con-

tributory negligence on plaintiff's part, he ought not to recover, and the court should have so instructed the jury. The question, however, was left to the jury.

It is complained that there was error in telling the jury, in the seventh instruction:

"Neither negligence nor contributory negligence are ever presumed. Whoever asserts that another was guilty of either negligence or contributory negligence must establish it by a preponderance of the evidence or fail in his action or defense."

It is claimed that this omits a feature present in this case, namely, that a party's own evidence may show contributory negligence. But by instruction No. 11 the court told the jury:

"If plaintiff's own testimony tends to show that he was guilty of carelessness which caused or aided in causing his injuries, then the burden shifts, and it devolves upon the plaintiff to satisfy you by a preponderance of the evidence that he was not guilty of contributory negligence."

It seems to be conceded that if these were in one instruction they would together correctly state the law. It is thought that they must be considered together. If their effect, when so taken together, is to correctly submit the issue of contributory negligence, the placing of them in separate paragraphs can hardly have been prejudicial. It is thought that the trial court was right in refusing to say, as a matter of law, that the proof showed contributory negligence, and that defendant cannot justly complain of the manner in which the instructions submitted this question.

It remains to consider the questions raised as to the settlement, and as to excessive damages. The settlement seems to have been the hardest contested matter at the trial. In regard to this, defendant's manager, White, and Gilbert, the insurance company's western agent, both denied plaintiff's statements, and it is insisted now that the receipt, backed by their testimony, is conclusive against plaintiff. The right of plaintiff to have this question submitted to a jury on the trial court's view of the law has been indicated. The court refused an instruction in these terms:

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“If you find from the evidence that plaintiff had the capacity to read the release signed by him in duplicate, and that Gilbert pretended to read same to plaintiff, though you believe in fact Gilbert misread said release, yet if, before plaintiff signed it, the plaintiff had an opportunity to read it, but nevertheless chose to rely upon what Mr. Gilbert told him about its contents, the plaintiff is estopped by his own negligence from claiming that said release is not legal and binding upon him according to its terms.”

The instruction actually given was as follows:

“If you find from a clear preponderance of the evidence that the paper offered as a release does not correctly state the settlement that was in fact made between the plaintiff and Mr. White or Mr. Gilbert, or both, and if you further find that the settlement really made was limited to the matter of doctor's bills and hospital expenses, and that the plaintiff was induced to sign such release by its being misread to him in such a way as to cause him to understand and believe that it was a receipt only to an insurance company for money paid on account of his hospital expenses and doctor's bill, and not on account of his injuries generally, and if such misreading was done for the purpose of deceiving him and procuring his signature to a paper which was contrary to the settlement he was making, the plaintiff would not be bound by such receipt. If you find that said release is not binding on the plaintiff, then you will proceed to a consideration of the evidence with respect to the charge of negligence made against the defendant; but if you find that said release truly states the settlement that was made when the receipt was signed, then you need proceed no further in the consideration of the case, but should return a verdict for the defendant.”

As before stated, unless plaintiff is to be held to have been under a duty to read this paper and so inform himself as to its contents, and to be estopped from denying its validity inasmuch as he did not do so, there is evidence that should go before the jury. Upon this question of estoppel by reason of failure to read the release, the defendant cites and relies upon *Wallace v. Chicago, St. P., M. & O. R. Co.*, 67 Iowa, 547, 25 N. W. 772. The instruction, which in that case the court says should have been given, does bear a considerable analogy to the one tendered at the trial of this case. It, however, wholly omits the misreading to induce signature, charged in the present case and mentioned in the instruction here given. The court in the Iowa case expressly says of the plaintiff:

“He does not claim that he requested the instruments to be read to him, or that the contents were purposely misrepresented in the reading, or that he was deceived by any sleight of hand, legerdemain, or artifice.”

In the present case the court was asked to say, as a matter of law, that plaintiff, because he could read, had the opportunity to read it, and did not, but relied upon the other party, was estopped to deny the effect of an instrument which he claimed, and has some corroboration in claiming, did not represent the agreement he had made, and which, he says, was intentionally misread to him to procure his signature. We hardly think it can be pronounced error to tell the jury that, if they found the plaintiff's allegations supported by a clear preponderance of the evidence, the receipt was not binding. *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, cited by defendant, was a case of suit by an assignee against a stockholder for unpaid portions of the capital stock. As against the creditors, the taking of the stock upon fraudulent representations was held to fix the liability, unless the contract had been seasonably repudiated and the stock tendered back on rescission. Upon the latter question it was held that defendant had a right to, the opinion of the jury. In *Woodbridge v. De Witt*, 51 Neb. 100, 70 N. W. 507, this court says:

"It is elementary that, where a contract is reduced to writing, parol evidence is not admissible to contradict it or vary its terms. It is also true that a party cannot generally avoid the effect of a written instrument by showing that he signed it without reading it or in ignorance of its terms, but he may avoid it for fraud. The general rule referred to is not applicable in a suit between the original parties to the contract, where the defense is that the writing, by reason of fraud, does not embrace the contract actually made."

The third paragraph of the syllabus of the same case says that there is no estoppel where fraud is resorted to "in order to induce the other to sign without reading." If a "clear preponderance of the evidence" in the present case, as the jury found, shows that this writing did not represent the contract made, and that it was misread to plaintiff by those procuring it for defendant, the conclusion seems inevitable that it was done to induce him to sign without reading. The jury was told that the evidence must show "by a clear preponderance" that it was for this purpose.

A contention is made, but apparently not with great confidence, that the \$325 which was paid on the settlement should be returned.

New Omaha Thomson-Houston Electric Light Co. v. Rombold.

The trial court instructed that, if the settlement was void, the \$325 must be credited upon the damages. If the fraud was established, and plaintiff's claim was found to exceed the sum paid, this seems to make a just application of the money. As counsel for plaintiff say, the settlement admitted to have been made of the expenses is not sought to be impeached. It would seem that only the writing, so far as it embodies a settlement of damages, is attacked, and no obligation to restore the \$325 rested upon plaintiff. *Mo. Pac. Ry. Co. v. Goodholm* (Kan. Sup.), 60 Pac. 1066; *O'Brien v. C., M. & St. P. Ry. Co.*, 89 Iowa, 657, 57 N. W. 425.

It is urged that the damages are excessive, and so much so as to show passion and prejudice on the jury's part. Cases are cited in which, for loss of a foot, awards somewhat smaller than this one have been held excessive and *remittiturs* ordered. Other cases are cited by plaintiff where the award for the loss of a foot was larger than in this case, and was yet sustained. In this case both feet were injured. The right one was amputated nearly 11 months after the injury, and after much suffering. The plaintiff was 33 years of age, and earning \$65 monthly at his employment. It cannot be said that the amount alone of this verdict is such as should absolutely set it aside. It is true that for a slightly smaller sum an annuity to the full amount of plaintiff's former earnings could be obtained, and his present earning capacity must be something. On the other hand, his sufferings have undoubtedly been great, and their value cannot be adequately measured. We have no measure which we can apply to determine that any reduction should be made in these damages. If the findings that there was negligence of the defendant, no contributory negligence of plaintiff, no assumption of the risk, and no settlement of damages, are all sustained, it would seem that the judgment should be affirmed.

It is recommended that the judgment of the District Court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

Per CURIAM: For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

FULTON V. GRIEB RUBBER CO.

New Jersey; Supreme Court.

1. INJURY TO EMPLOYEE BY DEFECTIVELY INSULATED ELECTRIC LIGHT WIRE.—

An incandescent electric light wire suspended from the ceiling of the defendant's factory came in contact with a mill at which the plaintiff was working. The insulation of the wire had become worn, and the wire coming in contact with a steam pipe connected with the mill momentarily charged it with electricity, and the plaintiff placing his hand upon the frame of the mill received an electric shock, causing him to lose his balance and fall against the rolls of the mill, whereby his hands were caught and so severely crushed as to necessitate amputation. The alleged negligence of the defendant company consisted in failure to inspect the wire. It was held that the defendant was not negligent in failing to make such an inspection, since the electric lighting system, including the wire causing the accident, had only been installed for a few months and there was nothing in the case to suggest that the insulating material covering the wire would not have remained intact for many years.

Verdict for plaintiff; rule to show cause may be absolute. Decided March 2, 1903; reported 54 Atl. 561.

Linton Satterthwaite, for plaintiff.

G. D. W. Vroom and *E. R. Walker*, for defendant.

Opinion per CURIAM:

Plaintiff was injured while working at a "mill" in the defendant company's factory. His story of the accident was that as he was standing at his mill, with his hand resting upon its frame, an incandescent electric light wire, which was suspended from the ceiling, and which, when not swaying, hung down at a distance of about two or three feet from the mill, was blown by the wind against a steam pipe connected with the mill, thereby momentarily charging the mill with electricity; that, by reason of the contact of his hand with the frame of the mill, he received an electric shock which caused him to lose his balance and fall against the rolls of the mill; that his hands were caught in them, and so severely crushed as to necessitate amputation. There was a verdict for the plaintiff. We think it should be set aside, for two reasons:

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1. It rests upon the conclusion that the accident happened substantially in the way described by the plaintiff; *i. e.*, by his receiving an electric shock, communicated from the incandescent light wire in the way described. This conclusion is against the preponderance of the evidence.

2. The evidence shows no negligent act or omission on the part of the defendant which contributed to plaintiff's injury. The incandescent light wire, when it was originally installed, was properly covered with insulating material, but at the time of the accident this material had been torn or worn away from a small section (about half an inch) of this wire at the point where it was said to have come in contact with the steam pipe connected with the mill on the occasion of the accident. The alleged negligence of the master (the defendant company) was its failure to inspect this wire. The duty of a master to make inspection of appliances furnished to workmen, or located in the place in which they are working, does not require such inspection to be continuous. It is to be made at reasonably frequent intervals. Where the appliance is not normally subjected to any wear and tear, and there is no apparent likelihood of its getting out of order, or, if it does so, of its being in the slightest degree dangerous to employees, much less frequent inspections by the master are necessary, in the discharge of his duty to his servants, than when the appliance is a machine in constant use, and dangerous to them when out of order. In this case the electric lighting system (including this incandescent wire) in the defendant company's factory had only been installed for a few months. There is nothing in the case to suggest that the insulating material which covered this wire would not have remained intact for years, unless injured by some outside agency. Nor is there anything in the case which will justify the conclusion that the defendant, in the exercise of a reasonable prudence, should have anticipated the probability of its being so injured. For this reason, the failure of the defendant to inspect this wire between the time of its installation and the time of the plaintiff's accident was not negligence.

For both reasons, the rule to show cause should be made absolute.

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A master using machinery operated by electricity is bound to exercise a very high degree of care for the protection of employees. So where the evidence shows that a crane upon which the plaintiff was at work was defectively constructed, either in that there was a metallic connection between the hauling chain of the crane and the motor which operated it, and that although the electricity from the motor to the lifting chain and hauling chain was probably insufficient to be dangerous with no greater current than that designed to be used to operate the crane, yet it was liable to become dangerous from the presence of a more powerful current; and where it further appeared that the wire supplying electricity to the motor of the crane came in contact with a more heavily charged wire, thus charging the motor wire with an unusual current of electricity, and the different parts of the crane thus became charged with a dangerous current, which by contact caused the injury to the plaintiff, it was held that the circumstances were such as to impose upon the defendant the duty of protecting its employees from injuries likely to be received from contact with the different parts of the crane. *Moran v. Corliss Steam Engine Co.*, 7 Am. Electl. Cas. 743, 21 R. I. 386, 43 Atl. 874.

WAGNER V. CITY OF PORTLAND.

Oregon; Supreme Court.

1. **LIABILITY OF CITY FOR NEGLIGENCE OF ITS OFFICERS IN OPERATION OF FIRE ALARM SYSTEM.**—A city is responsible for the negligent acts of a board of commissioners having exclusive authority on behalf of the city to perform all executive functions relating to the organization, management and control of its fire department. Where such a board employs a superintendent to direct the operation of a fire alarm system and vests him with power to employ persons to work upon such system, the negligence of such superintendent causing an injury to a person employed by him is the negligence of the city, for which damages may be recovered of it.
2. **INJURY CAUSED BY NEGLIGENT ACT OF FELLOW SERVANT.**—Where, at the time of the injury, the plaintiff was at work with other persons employed in the same capacity, all of whom were acting under no special directions, but were using their own judgment as to the manner of performing the work, such other persons are fellow servants of the plaintiff and he cannot recover from the city for injuries received through their negligence, unless it be shown that the city was negligent in failing to adopt such precautionary measures as would have prevented the injury.

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3. **ADOPTION OF RULES.**—The question whether there is negligence in failing to adopt suitable rules is not for the jury unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by the adoption of a particular rule. Where a number of fellow servants were engaged in taking down electric wires and were not acting under any direction, the cutting of a wire at the proper place for the convenience of the work, and to insure the safety of the employees, is a detail of the work which was for the judgment and control of the workmen themselves and not for the city to regulate by the adoption of rules for their guidance.
4. **USE OF RUBBER GLOVES AND BOARDS TO STAND ON.**—Where an employee has worked in connection with electric wires for two months and a half without the protection of rubber gloves, and wooden boards to stand upon, and it is shown that he still continued the employment, knowing the hazards attending the work, he must be deemed to have assumed the risk of performing his work without them.
5. **KNOWLEDGE OF DANGER.**—A man of mature years and judgment, not laboring under any mental disability, who has been warned from time to time of the danger of being killed while performing duties in proximity to electric light wires, and who had heard his fellow servants say that they had received shocks while in the same employment, and who witnessed the effect of electricity on a horse, communicated by a sagging wire, is precluded from gainsaying knowledge of the danger of electricity, and of the hazards he was incurring while engaged in the service.

Appeal by defendant from judgment for plaintiff. Decided January 20, 1902; reported 40 Ore. 389, 67 Pac. 300.

A board consisting of three commissioners appointed by the mayor is given by the charter of the city of Portland full, complete, and exclusive power and authority on behalf of the city to perform all executive functions thereof in the organization, management, and control of its fire department, and all powers and duties incident thereto. Session Laws 1898, p. 132, sec. 87. In pursuance of this authority, such board had under its control and management a system of fire alarm wires; being the property of the city, and used for communicating alarms of fire occurring therein. R. G. Paddock, who was the city electrician, and superintendent of the system, deriving his authority from the board, employed the plaintiff as groundman. While engaged in that capacity, keeping the system in repair, he was injured by receiving a shock from an electrical current, for which injury he brings this action for damages, alleging that it was caused by the negligence of the municipality; and, having obtained a judgment in the trial court, the defendant appeals.

J. M. Long, for appellant.

Thos. O'Day, for respondent.

Opinion by WOLVERTON, J.:

By defendant's separate defense, which was stricken out on motion, two questions are presented, which lie at the threshold of the controversy. It is maintained with much emphasis (1) that the board of fire commissioners is an independent body, so constituted by the charter, with full and exclusive power and control over the fire department, and the city is in no sense responsible for its acts; and (2) that the board, in prosecuting such improvement, acted in a political and governmental, rather than in a private or corporate, capacity, and therefore it cannot be held amenable for the negligence of its officers and agents. The two positions are not altogether consistent, as the latter seems to assume that the fire department is not an independent body, such as to shift liability from the city. But the purpose is manifest to save both questions, and, if the former is decided adversely to the contention, then the latter becomes a live issue. We think that the charter settles the former. It vests in the board the executive functions of the city pertaining to the organization, management, and control of the fire department, and all powers and duties incident thereto. As to this particular department, therefore, the board stands in the place and stead of the common council, exercising the authority of that body; and its acts become as much the acts of the city as if the common council had performed them, had not the authority in the premises been transferred to the board.

As to the latter question, it is one of more difficulty,—not so much in the finding of general rules governing the liability of municipal corporations for torts committed through their officers and agents, but in determining where the case falls, and by what rules it is governed. Municipal corporations exist in a dual capacity, and their functions are twofold. In one, they exercise the right springing from sovereignty, and while in the performance of the

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duties pertaining thereto their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service, in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority, but are officers, agents and servants of the State (that is, the political divisions thereof, or the public at large), and for their acts of omission and commission the municipalities themselves are not liable. In the other, they exercise a private, proprietary, or corporate right, arising from their existence as legal persons; and where the duty is one that rests upon the municipalities in respect of their special or local interests, and not as public agencies, and is absolute and perfect, not discretionary or judicial in its nature, their officers and agents in the performance of the function or duty act in behalf of, or as the *alter ego* of, the municipalities in their corporate capacity, and not for the State or public at large, and for their acts the municipalities are held to accountability. This has become the settled doctrine in the jurisprudence of this country, about which there is no dissent. *Caspary v. City of Portland*, 19 Or. 496, 24 Pac. 1036, 20 Am. St. Rep. 842; *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, and cases there cited; 1 Jag. Torts, 173, 179; Mechem, Pub. Off. secs. 850, 853; 2 Dill. Mun. Corp. (3d ed.), sec. 980. Touching the liability of municipalities in their corporate capacity, the rule is succinctly stated in *Wright v. City Council of Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256, as follows:

“Whenever the negligence or nonfeasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation is exercising, as a corporation, its private franchise, powers, and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolu-

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ment, though insuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers, precisely as are individuals."

Undeniably, municipalities, when acting through their fire departments in the preservation of property from the devastation of fire, are in the exercise of a purely governmental function, and their officers and agents represent the public, as an arm of the State, for whose acts the corporations are not liable. It was so held in *Hafford v. City of New Bedford*, 16 Gray, 297, where certain of the firemen negligently ran a hose carriage against the plaintiff and injured him. So, in *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196, where the hose provided by the city, and in use through the fire department, burst, causing the injury complained of. In this case Mr. Justice Gray, now of the Supreme Court of the United States, says:

"But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity; nor is any part of the expense thereof authorized to be assessed upon owners of buildings, or any other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way. . . . It makes no difference whether the Legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or bylaw. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents."

And in *Mendel v. City of Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665, where the city authorities allowed pipes laid to plaintiff's premises for conducting water thereto, to be used for fire and other purposes, to fill up so as not to be serviceable in the extinguishment of a fire, to his damage, the same doctrine was upheld. So, also, in *Welsh v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762, where the engineer of the fire department, under the direction

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of the village trustees, in thawing out a hydrant connected with an aqueduct, flooded the street with water, which becoming frozen, the plaintiff was injured by falling thereon. And in *Wilcox v. City of Chicago*, 107 Ill. 334, 47 Am. Rep. 434, where the plaintiff sustained injury by the collision of a hook and ladder wagon with his carriage; also in *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533, where the injury occurred through fright of the plaintiff's horse, caused by a stream of water thrown from a hydrant by the officers of the fire department, at the request of the mayor of the city, for the purpose of testing the capacity of the hydrant; and, again, in *Kies v. City of Erie*, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867, where the door of an engine house was so negligently operated that, when being opened upon the sidewalk, it struck a pedestrian and injured him. Many other cases might be cited, but these are sufficient to illustrate the doctrine. The nonliability of the municipality is based upon the idea that it is acting in a public or governmental capacity, as an arm of the State, and hence the doctrine of *respondeat superior* is without application. But the case at bar is distinguishable from any of these cases, or any that we have been able to find applying the doctrine referred to therein. Here the city was acting in the discharge of a legal duty to repair the fire alarm system, and the case is one of common employment for the performance of a special service for and in behalf of the city. The duty was being performed through the instrumentality of private or corporate agencies, and not through the fire department or its officers, or through officers of the city whose duty it was to perform such work; and it might be added that the work of repairing was an act ministerial in its nature. In a similar case (*Mulcairns v. City of Janesville* [Wis.], 29 N. W. 565), where the city was engaged in the construction of a cistern for the use of the fire department, and an employee was injured through the negligence of other employees, it was held that the city was liable, under the doctrine of *respondeat superior*; so, in *McCaughey v. Tripp*, 12 R. I. 449, where an employee was injured while the city of Providence was engaged in the construction of a city hall. See, also, *Donahoe v. City of Kansas City*, 136 Mo. 657, 38 S. W. 571;

City of Toledo v. Cone, 41 Ohio St. 149. From these latter authorities we are impelled to the conclusion that corporate liability exists in the case at bar, and that the further and separate defense of nonliability was therefore properly stricken out. Plaintiff's counsel contend that the statute settled the question at the very outset. But it only gives the action against the municipality when it is liable in its corporate capacity, as distinguished from its political or governmental capacity, as an arm of the State in the exercise of sovereignty. Hill's Ann. Laws, secs. 349, 350. So the question recurs, in what capacity was the city acting when the injury was sustained?

At the close of the testimony the defendant moved for a nonsuit, but without success, and error is predicated upon the action of the court in that regard. This necessitates a consideration of the testimony adduced, with a view to ascertaining whether the plaintiff proved a cause sufficient to be submitted to the jury. The basis of the action is the negligence of the city, its officers and agents, contributing as a proximate cause to the injury sustained by the plaintiff; and unless acts are shown from which negligence may be reasonably inferred in some particular, and attributable to the city in its corporate capacity, the case is not such a one as should be submitted for the jury's consideration. The Portland General Electric Light Company was operating a system of electric light wires, extending north and south on the east side of Sixth street where it intersects Yamhill, among which are what are known as "primary wires," carrying from 1,000 to 1,200 volts of electricity; one of its poles standing immediately within the curbing at the southeast corner of Sixth and Yamhill streets, and another south of that, about two-thirds of the distance across the block, near Mr. Corbett's barn. The Oregon Telephone Company had a system of wires on the west side of Sixth street, one of the poles standing a little south of the southwest corner of Sixth and Yamhill; and the Columbia Telephone Company had a system extending east and west on the south side of Yamhill street. The city had its fire alarm wires attached to the Columbia Telephone Company's poles, extending west on Yamhill street to Sixth, at which point

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and from there south it was attached to the electric company's poles. Immediately prior to the time of the accident the superintendent directed that the city's wires should be changed in some particulars so as to avoid contact with some shade trees; and in obedience thereto a new wire had been attached along Yamhill, extending across Sixth street, and attached to the Oregon Telephone Company's pole, and thence southward back across Sixth street, and attached to the electric company's pole near Mr. Corbett's barn, whereupon the old wire was cut near the engine house, or at Fourth and Yamhill, and again at the pole where the new one was attached, and the end thrown over into Sixth street. Being detached from the electric company's pole at the southeast corner of Sixth and Yamhill, one of the workmen drove a staple into the top of the pole, with a view of keeping it off the electric company's wires while it was being taken down. The plaintiff, acting in his capacity as a groundman, and with a view to reeling it up at the same time, in conjunction with others, attempted to take it down by pulling it through the staple from a point on Sixth street near the curb on the east side where the end of the wire had fallen when cut. Finding the wire fast, the men with him let go,—one of them to go up the pole to loosen it, and the others across the street, so as to get a view of the situation; but the plaintiff, continuing in his efforts to dislodge the wire, brought it in contact with one of the electric company's primary wires, resulting in his injury. The plaintiff's account of the incident is, in substance, that he was at the time, September 28, 1897, and had been since July 13th preceding, in the employ of the city in the capacity of a common laborer to assist in changing the telephone and fire alarm wires; that his particular service was as a groundman; that he was assigned to the duty of attending the reel and reeling up the wire as it came off the poles, and such other work as was necessary to be done on the ground, digging post holes, helping to set up poles, making connections on the ground, and dropping old wires when the insulation was off; that other men were working with him, namely, Cherry, Fisher, Schad, Baker and Severian, the latter being the foreman of the gang; that after the wire had been cut he took his

reel from the southwest corner of Sixth and Yamhill streets, where it then was, to where the end of the wire lay; that he, Baker, Cherry and Schad pulled on the wire until they found it was fast; that some one suggested that Cherry go up the pole, which he did, and Baker and Schad crossed over to the corner on the other side of Sixth street, and that the witness, continuing in the effort to dislodge the wire, received a shock; that the wire was above the electric company's wires, and from where he was he could not see the point of contact with them, because of a tree which obscured his vision; that he did not understand, nor was he experienced as to the nature of, electricity; that he was perfectly ignorant of the danger of it; that neither the city nor its officers had ever given him any advice or instruction touching the danger of his employment, except on one occasion, some four or five weeks previous, when he was warned while adjusting a heavily insulated wire that he had better stand on some boards, as he was liable to get killed; that he had no previous warning by the city or its officers of the existence of the primary wires of the electric company, or that they were charged with electricity; that the city had no rules for the government of laborers in performing their work, and did not furnish boards for them to stand on, or rubber gloves for them to use. On cross-examination he testified that the wire was a very old one, the insulation being off in places, and that he might have taken hold of it where the insulation was off, and that he had assisted in taking down a good many miles of wire. H. H. Cherry testified that the electric company's wires were insulated primary wires, heavily charged, and used for distributing electricity about the city; that the plaintiff, Schad, Baker and himself started to pull the wire down, when it caught somewhere on the pole; that he went up to take it loose, and plaintiff was shocked; that he heard him make a noise, and saw the wire rocking,—saw it come in contact with the electric company's primary wire,—whereupon he took hold of it and lifted it clear; and that there was a bare connection with the primary wire. On cross-examination he stated that he did not recollect whether he cut the wire on Sixth street, near Corbett's barn, or not, or whether Cullings, one of the men working in the

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gang, cut it, but whoever it was threw it over into the street; that the men, as a crew, had been taking down the wires for about two months, and that plaintiff had been with them during the time; that it was his custom when he went up to unfasten these wires to look and see if they were going to come in contact with primary wires; that a man would recognize such things; that he knew there was a primary wire there when he unfastened the wire in question and took it off the insulator; that he put a staple in the top of the pole somewhere, and the wire came through, and the men pulled against it; that they could just as well have cut the wire at the pole as not; that the men used their own judgment as to where they should cut the wires; that they were supposed to work under Mr. Severian's orders, and that, if he told them to cut the wire in a certain place, it was done; that Severian was working with the men under Mr. Paddock, the electrician; that Paddock gave the general orders, and the men, under Severian's orders, would execute them; that at the time he fastened the staple he thought it was the best way to keep this wire off the primary wire of the electric company, but it did not suffice for the purpose; that all he had to do when he went up the pole the second time was to lift the wire off the primary wire; that, to the best of his recollection, the covering of the wire was carried up in a bunch at the staple, and that when this was taken out and cut off the wire was pulled down over the primary wire; that the staples used were big, strong staples; and that he used the one on that occasion according to his best judgment to keep the wire from coming in contact with the primary wire. R. G. Paddock testified that he was superintendent of the fire alarm and police signal wires in the city; that he hired all the men, subject to the action of the board of fire and police commissioners; that he was given authority by these boards to hire such men as necessity required; that no rules had been promulgated requiring the wires to be cut where crossing primary wires, or the electric company to turn off its electricity, nor were there any boards or rubber gloves furnished for the use of the men; that rubber gloves, being nonconductors, were designed to protect the men from receiving a shock from a heavily charged wire, or one carrying a

great voltage; that under certain circumstances boards are nonconductors; that all these things are relative, depending upon the voltage; that a dry board is a nonconductor; that if a person is standing on a dry board, and the voltage is comparatively low, the board will act as an insulator, the same as glass, and that 1,000 volts is comparatively low, nowadays,—speaking generally, a dry board, or a piece of dry carpet, or a piece of paper or glass, are all considered nonconductors (in other words, they are very poor conductors of electricity); that none of them are strictly nonconductors, but are relatively high in resistibility, and that if a person would get on some dry boards or a piece of paper, or a piece of dry rubber, or anything like that, he could handle 1,000 volts without danger; that the matter of putting up and taking down these wires was largely a matter of detail with the workmen themselves; in some specific cases, Severian or witness would give special instructions, but, as a general proposition, the cutting or handling of the wires was a matter of detail with the crew. Other witnesses were called, but this is the practical effect of the testimony, and there is nothing to dispute it. It is at once apparent from this testimony that the acts immediately contributing to the injury of the plaintiff were the acts of Cherry or Cullins in cutting the wire at the pole near Corbitt's barn, and casting it into the street across the primary wires of the electric company, and the act of Cherry in securing it to the top of the pole in such a manner as to allow it to come in contact with such primary wires. Further than this, the act of the plaintiff and the workmen with him in attempting to pull the wire through the staple from the position where the end of it fell, instead of taking it across the street opposite the pole where it was fastened, may have been a contributing factor. Cherry says he used his best judgment in attaching the staple so as to have the wire come off clear of the primary wires, but failed in his purpose, possibly because of the position of the plaintiff in doing his work. But waiving the feature of plaintiff's position, it is clear that the person who cut the wire and threw it into the street across the wires of the electric company, and Cherry, who endeavored to make it fast to the top of the pole to which the primary wires were at-

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tached, so as to avoid contact with them, were fellow servants with the plaintiff, and he is precluded from recovery on that account, unless the city has been derelict in its duty, by not taking proper precautionary measures looking to the safety of its employees, whereby the plaintiff's injury ensued, without the concurrence of his own acts or those of his fellow servants contributing thereto. As to who are fellow servants and who is the master, has been satisfactorily settled by this court in *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, wherein it was said (Mr. Justice Bean announcing the opinion of the court):

"The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a coservant, is, was the offending employee in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows. If not, he was a mere coservant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employee who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence."

Paddock was the city electrician and the superintendent of the alarm system. He directed the work to be done, and the men under the immediate direction of Severian, as his assistant, were engaged in the service. The linemen used their judgment as to the manner of detaching and taking the wires down, and it was not the master's duty to give specific directions touching the details of the work. Whoever attended to that while engaged in the particular capacity was a fellow servant with the plaintiff, and not a master or vice principal. It is the duty of the master, however, to adopt needful and reasonable rules and regulations for the government and protection of his agents and servants while pursuing their employment; to exercise suitable care and precaution to provide them with a reasonably safe place in which to work, and fit and safe tools and appliances to work with, and to employ suitable and competent fellow servants; and such duty cannot be delegated in any manner so as to shield him from responsibility. Whoever performs this

duty performs the master's duty, and, if he is not the master himself, he becomes a vice principal, and the master is still responsible. Now, plaintiff insists that it was the duty of the city to have adopted rules and regulations which, among other things, should have required the wires that were being detached and removed from the poles to be cut wherever they crossed a primary wire, or the electricity to be turned off the primary wires while the employees were at work in proximity thereto. It may be predicated of the employment in which the plaintiff was engaged that it was dangerous and hazardous, as it is common knowledge that electricity is a dangerous element, and those engaged in and about the instrumentalities and appliances by which it is handled and utilized in any considerable voltage are liable to come in contact with it and be injured. As a general rule, the dangers connected with such a business, that are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment, and are assumed by those who consent to accept employment under the circumstances. Such dangers, however, as are known and can be mitigated or avoided by the exercise of reasonable care and precaution by those engaged in the business are not perils which the employee must encounter as incident to the business, and the master is generally held to accountability for his neglect in this regard contributing to the injury of the servant. "In other words," says Mr. Chief Justice Ruger in *McGovern v. Railroad Co.*, 123 N. Y. 280, 25 N. E. 373:

"It is the duty of the master, having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution."

See, also, *Anderson v. Telegraph Co.*, 7 Am. Electl. Cas. 725, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

In this connection it should be observed that, although this duty is imposed upon the master, his neglect of it will not always render him liable as against a servant who engages in the employment with full and explicit knowledge of the master's default. The rule

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is stated thus, by Mr. Justice Devens in *Leary v. Railroad*, 139 Mass. 580, 584, 2 N. E. 115, 52 Am. Rep. 733:

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

It is probably best grounded upon the idea that, where two negligent acts conduce to an injury, responsibility attaches to the one that stands as the proximate or immediate cause; and in such a case the servant cannot hold the master responsible, although culpable, because his own negligence is the direct and immediate cause of his injury. *Stager v. Laundry Co.*, 38 Or. 480, 486, 63 Pac. 645, 53 L. R. A. 459; *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537. The question whether the defendant was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule. The court say in *Railway Co. v. Echols*, 87 Tex. 339, 343, 27 S. W. 60, 28 S. W. 517:

"Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raised that issue, it should have been submitted to the jury; otherwise it should not."

It may occur that the necessity and propriety of making and promulgating rules in a given case are so obvious as to make the matter one of common experience and knowledge. Such a condition would warrant a submission of the question as to whether the defendant was at fault in omitting its duty in this regard to the jury without evidence. But that is not the case here. It is manifestly not a matter of common knowledge and experience that rules such as plaintiff suggests would be practicable, or even useful, in the prevention of an accident of the kind. If notwithstanding they were in fact necessary and practicable, it was a matter susceptible

of proof, by showing that other municipalities, companies, or persons engaged in handling electrical machinery and appliances for generating and utilizing electrical currents had adopted and put into operations such rules, with serviceable results, or by the testimony of persons possessing peculiar skill and experience in the construction, repair, management, and operation of such machinery and appliances. No such proof is to be found in the record, and hence a case has not been made in this particular upon which to put the question of negligence of the defendant in omitting the adoption and promulgation of the rules insisted upon to the jury. *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57; *Morgan v. Iron Co.*, 133 N. Y. 666, 31 N. E. 234; *Railroad Co. v. Carruthers* (Kan.) 43 Pac. 230; *Whalen v. Railroad Co.*, 114 Mich. 512, 72 N. W. 323. Plaintiff did attempt, however, to establish the practicability and necessity therefor, but says he was not permitted to do so because of the objection of defendant's counsel, and he insists that defendant cannot now complain of error which it invited. The rule sought to be invoked is a wholesome one, authoritatively established. *Elliott*, App. Proc. sec. 630; *Jobbins v. Gray*, 34 Ill. App. 208, 218; *Insurance Co. v. O'Connell*, 34 Ill. App. 357, 360.

A witness was asked what he would say as to the necessity of having some rules adopted in regard to performing the work, and this question he was not allowed to answer. It does not appear that he was a person skilled touching the matter of inquiry, so that no error was committed in the ruling upon the objection, and no error could be invited where the objection was well taken.

As to the other inquiry, touching the adoption of rules by other companies for the doing of that class of work, the question put and rejected does not reach the point, as it was not confined to the specific rules which plaintiff insists should have been adopted for the prevention of the accident. That other companies had adopted rules generally for the regulation and doing of the class of work being done by the city was too general to be of any practical avail. This constitutes the effort made in that behalf, and we find no error of the court respecting it.

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Beyond this, however. we are of the opinion that, so far as developed by the evidence in this case, the cutting of wires, and the places where they should be cut so as to take them down conveniently and with the least danger to the workmen, are details of the work, which were for the judgment, discretion and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance. *Ulrich v. Railroad Co.*, 25 App. Div. 465, 51 N. Y. Supp. 5; *Golden v. Sieghardt*, 33 App. Div. 161, 53 N. Y. Supp. 460.

With reference to furnishing the workmen with boards and rubber gloves for their use, this may or may not have been the duty of the city. But however that may be, it is a conceded fact that plaintiff worked two months and a half without them, and it is absolutely shown that he still continued in the employment, knowing the hazards attending the work, and he must be deemed, therefore, to have assumed the risk. His negligent act in continuing in the work became the proximate cause of the accident, hence he cannot recover upon that account.

Plaintiff says, also, that he was ignorant of the danger of electricity, and was not warned by any officer of the city that the electric company's wires carried electricity in dangerous quantities. But he was a man *sui juris*, of mature years and judgment, not laboring under any mental disability; and his admissions show that he had been previously warned by Cullins, a fellow servant, of the danger of being killed while in the same service in proximity to the electric company's wires where they carried 5,000 volts; that he heard two fellow servants say they had each received shocks while in the same employment, and witnessed the effect of electricity on a horse, communicated by a sagging wire; and he must necessarily have known, as Cherry, Cullins, and other fellow workmen knew, not only the dangerous character of electricity, but the nature and condition of the electric company's wires. From his testimony there can be but one opinion touching the matter, and that precludes him from gainsaying knowledge of the danger of electricity, and of the hazards he was incurring while

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engaged in the service. Under these conditions, there was error in refusing the nonsuit.

Other testimony was offered in the further progress of the trial, but no new features of the case were developed, and nothing shown that would be curative of the matters pertaining to the injury.

The judgment of the trial court will therefore be reversed, and the cause remanded for such further proceedings as may seem appropriate, not inconsistent with this opinion.

BEAN, C. J., concurs in the result.

In *Massachusetts* it has been held that a municipal corporation is not liable for injuries to a lineman employed upon its fire alarm system due to the breaking of a pole caused by its own negligence. *Pettingill v. City of Chelsea*, 5 Am. Electl. Cas. 358, 161 Mass. 368, 37 N. E. 380.

SHUGARD V. UNION TRACTION CO.

Pennsylvania; Supreme Court.

1. INJURY TO STREET CAR CONDUCTOR CAUSED BY NEGLIGENCE OF CAR INSPECTOR.

—A conductor of a street car and a car inspector employed by a street railway company to inspect the electrical apparatus of its street cars are fellow servants, and where the conductor is killed by the negligence of such inspector in directing the motorman of the car to put on the trolley pole, after having tested an electric car to ascertain defects, before the conductor had reached a place of safety, the street railway company is not liable.

Appeal by defendant from judgment for plaintiff. Decided February 24, 1902; reported 201 Pa. St. 562, 51 Atl. 325.

Charles Biddle and *Thomas Leaming*, for appellants.

Charles H. Edmunds, for appellee.

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Opinion by POTTER, J.:

Benjamin F. Shugard, the husband of the plaintiff in this case, was a conductor in the employ of the defendant company for a period of over 10 years. He was accidentally killed in Germantown upon the afternoon of September 29, 1900, under the following circumstances: When his car reached the terminus of the line, an inspector of the defendant company was there, waiting with a testing car, for the purpose of making an inspection of the electrical apparatus. To facilitate this purpose, the car was stopped by the side of the testing car. The trolley pole was pulled down from the overhead wire and tied to the rear platform, so as to guard against the admission of any current of electricity from the overhead wire. The inspector in charge was inside of the testing car. His assistant stepped upon the front platform of the passenger car, bringing with him the end of a wire connected with the testing apparatus. The motorman of the passenger car was down upon the ground, but remained standing near the platform. The sole purpose of the test was to try the electrical connections upon the car, to be sure that they would properly utilize the current. The question of the safety of the car, either for the operators or for passengers, was not an element in this inspection at all. The test consisted in applying a wire connected with the testing apparatus to the various notches of the controller box, step by step. As the application to each notch was made, and indicated the proper condition, a bell was rung by the chief inspector, and then the assistant proceeded to turn on another notch by means of the controller handle. In this instance, according to the testimony, the controller was opened and closed some seven times, and the equipment was found to be in good condition, requiring no adjustment or repair. The test occupied but a few moments of time. The car was not taken away from the motorman or conductor, but was simply halted upon the track. While the test was being made, the motorman was within arm's length of his controller box and of the controller handle, and actually assisted in opening and closing the cover. The conductor, meanwhile, was sitting inside the car, looking over his accounts. There is some evidence to

show that upon the completion of the test the inspector made use of the expression: "All right. Put on your pole." But whether or not he used these words, he undoubtedly did signify that the test had been completed and was satisfactory. The assistant inspector stepped down from the front platform. The motorman was in the act of stepping upon the platform to take his regular place, when the car suddenly started, and ran a distance of its own length and stopped. A cry was heard, and the conductor was found lying crushed beneath the end of the car. It was obvious that he had untied the trolley pole from the rear platform, and in accordance with his duty and his custom at this point, which was at the end of the line, he had swung the pole around to the other end of the car, and that immediately upon its coming in contact with the overheard wire the car had started, and had run against him, knocking him down and crushing out his life. It appears from the evidence in the case, and is a matter of common knowledge, that the electrical current which supplies power to the car comes from the overhead wire. It cannot enter the car unless the trolley pole is on the wire, and it cannot enter then unless the controller is open. The motorman does not state whether or not he looked at the handle of his controller after the test was finished, and does not state whether the handle was at that time turned so as to open the controller to the reception of the power. The inference is, however, unavoidable, that such must have been the fact, for he states that the car started almost instantly when the trolley pole touched the wire. There is nothing in the evidence to indicate any imperfection in the electrical equipment of the car, for the test had shown that everything was in good shape. The starting of the car must, therefore, have been the result of mismanagement in its operation by the men in control. In running the car the motorman was in charge of the controller, and, as a consequence, regulated the admission of power to the car. The conductor had charge of the trolley pole, and it was his duty to see that it was properly placed in contact with the overhead wire. He was an experienced conductor, and was familiar with

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the operation of the car, and must have known that if, by any chance, the controller was open, the effect would be to start the car as soon as the trolley pole came in contact with the overhead wire. He was, of course, dependent upon the motorman for protection against any misplacement of the controller handle. The motorman was standing just at the edge of the platform, where a glance would have shown him the position of the controller handle, but apparently he failed to notice it. He testified that during the course of the inspection the controller had been turned on and off seven times to admit the current from the testing car. He and the assistant inspector, who was also a motorman, were the only ones who had anything to do with the handling of the controller during the inspection, and they were both standing so close to the controller handle as to be able to touch it with their hands. At the moment of the accident the assistant inspector had left the platform of the passenger car, and the motorman was just in the act of taking his regular position at the controller, when, through the action of the conductor, contact was made with the overhead wire, and the deplorable result followed.

The trial judge instructed the jury that the case was bare of any evidence of negligence for which the defendant company could be held responsible, unless it were found in the conduct of Branson, the inspector. The court left it to the jury to say whether or not, under the evidence, Branson got such indications on his testing machine as would show that the controller was in the proper position when he said: "All right. Put on your pole,"—and said further that, if the jury believed that he gave the signal to restore the pole before he received indications that the controller was in the proper position, they might find that there was negligence for which the defendant company was responsible. We think the learned court misapprehended the testimony in this respect. A careful reading of the evidence upon this point, as it is before us, shows that, in the position which Branson occupied, he could not tell whether the controller was on or off. He was asked: "Q. Does it (the controller) give its own signal when it is thrown off? A. If the hook is not removed from the

pole, the needle would go to zero. That would show you that the controller was off. If they removed the hook from the pole, the needle would go to zero, also, and you could not tell whether the controller was off or on." This statement shows that Branson could not know from his own observation the position of the controller. His assistant, Plumb, and the motorman of the passenger car could readily see it. Branson denies giving any signal, except the one to his helper to throw the controller off when the test was finished. But even if he did use the words: "All right. Put your pole on,"—the expression was merely an indication that he was through with the test, and that the conductor and motorman might resume the use of the car. But under any aspect of the case, Branson was not acting in the discharge of any duty which the law imposes upon the employer, and therefore cannot be considered as a vice principal. When the employer has furnished reasonably safe appliances, and made suitable provision for their inspection and repair, his duty is done. He is not liable to an employee for the negligence of another employee who is intrusted with the use or management of the apparatus. As said before, the purpose of the inspection which Branson made was not to determine the safety of the car, either for the employee or the public. He was merely testing the efficiency of the electrical appliances, and while so engaged was merely a co-employee with his fellow workers. It would never do to hold an employer liable to one employee for the negligent or unskillful use by other reasonably competent fellow workers of the necessary and reasonably safe tools and appliances which had been furnished. The responsibility for this most unfortunate accident must therefore rest upon those who were co-employees of the deceased. The negligence, if any, was theirs, and nothing is disclosed by the evidence for which the defendant company should be justly held responsible.

The assignment of error is sustained, and the judgment is reversed, and is now entered here for the defendant.

Dallas Electric Co. v. Mitchell.

DALLAS ELECTRIC CO. v. MITCHELL.

Texas; Court of Civil Appeals.

1. **INJURY OCCASIONED BY DEFECTIVE CUT-OFF BOX.**—The plaintiff was injured by an electric shock received while in the service and employment of the Dallas Electric Company, one of the defendants, in the capacity of line-man. The foreman, under whose direction he was working, commanded him to transfer certain wires from one pole to another, and at the same time announced that the electricity had been cut off from the wires and that they were dead. It was alleged that the foreman had pulled the plug in a cut-off box, which, if the contrivance had been in working order, would have resulted in cutting off the electricity from the wires which the plaintiff was directed to transfer, and that a defect in the cut-off contrivance was the cause of the shock received by the plaintiff in handling such wires.

The defendants attempted to prove that the condition of the cut-off box was such as to indicate to the foreman that the current of electricity was cut off. Such evidence was excluded, and it was held error, since it was an important question in the case as to whether or not the foreman exercised due care in the matter of ascertaining whether or not the current of electricity had been cut off from the wires which he had directed the appellee to transfer. It was also held error to permit a witness for the plaintiff to answer a question in the following form: "Was it not his (the foreman's) duty to see that the wires passed through the box so that pulling it would kill it?" Such question was leading, and the answer thereto, the expression of the opinion of a witness, and should have been excluded.

2. **PARTIES DEFENDANT.**—The plaintiff was an employee of the Dallas Electric Company. It appeared that this company and its properties were in the possession of and being operated by a receiver, who was also made a defendant. The Standard Light & Power Company insisted that the plaintiff sustained no contractual relation with it. The plaintiff alleged that the business of the plaintiff was identical, and that at the time of the injury they had combined and consolidated their business and were being operated together, and were carrying on their business as one concern, and that by invitation and authority of each of the defendants he was at work upon the property of each of them at the time he was injured. It was held that the pleading was sufficient to show the relationship of master and servant between the defendants and the plaintiff; and that, although ordinarily, where a receiver is in charge of the properties of a corporation the corporation is not liable for injuries resulting from the negligent operation of such properties by the receiver, yet, if the corporation remains in joint control and management of its property, with the consent of the receiver, the liability of the corporation continues.

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Appeal by defendant from judgment in favor of plaintiff. Decided November 7, 1903; reported 76 S. W. 935.

Etheridge & Baker, for appellants.

W. P. Finley and *W. J. J. Smith*, for appellee.

Opinion by TALBOT, J.:

G. W. Mitchell sued the Dallas Electric Company, E. M. Reardon, as receiver of said Dallas Electric Company, and the Standard Light & Power Company, in the District Court of the Fourteenth Judicial District, to recover damages on account of personal injuries alleged to have been sustained by reason of their negligence. A jury trial on the 13th day of October, 1902, resulted in a verdict and judgment in favor of plaintiff against all of the defendants, and, motion for new trial having been overruled, they excepted and appeal.

Appellee alleges in substance, that the defendants the Dallas Electric Company and the Standard Light & Power Company are corporations duly organized and existing under the laws of Texas, and were on the 4th day of October, 1901; that the defendant E. M. Reardon at that time was the duly appointed and acting receiver of the said Dallas Electric Company, and resided in Dallas county, Tex.; that prior to and on said 4th day of October, 1901, the said Dallas Electric Company and the said Standard Light & Power Company were engaged in the production, manufacture, and sale of electricity in the city of Dallas, having poles set along the streets of said city of Dallas, and wires strung upon the same to convey electricity to their patrons; that on the said 4th day of October, 1901, appellee was in the service and employment of the Dallas Electric Company and E. M. Reardon, as receiver thereof, and of each of them, in the capacity of lineman, and while engaged in the line of his duties in handling and transferring wires of the said Dallas Electric Company and E. M. Reardon from their poles stationed at the northwest corner of Ervay and Marilla streets to and upon poles of the Standard Light & Power

Company, which were also situated at the corner of Ervay and Marilla streets, he received a severe electrical shock, causing him serious and permanent injuries. He alleges that John Wood was foreman and vice principal of the defendants Dallas Electric Company and E. M. Reardon, receiver, and that he (appellee) was under the control and subject to the direction of said Wood, who, as such foreman and vice principal, had authority to command, control, employ, and discharge appellee and other men working with him. Appellee further alleges that, before he and those engaged in the work with him began transferring the wires from the poles of the Dallas Electric Company and E. M. Reardon to the poles of the Standard Light & Power Company, the said John Wood told them to wait until he (Wood) went to a point on Ervay street, north of Marilla street, and pulled the primary wires, which, when pulled, cut off all electricity from the wires which they were to handle and transfer; that appellee and the others who were so engaged in said work did not begin work until said Wood returned; that Wood returned to them at the northwest corner of Ervay and Marilla streets in a few minutes, and announced to them that the electricity had been cut off, and that the wires were dead, and directed them to proceed to work; that he and those engaged with him at once began to work transferring said wires, resting under the belief, from what the said foreman had said, that the current of electricity had been cut off of the wires which he was to handle, and that said wires were dead; that instead of being dead, as he (appellee) supposed, from the statement of said Wood, they were heavily charged with electricity; and that by reason of having come in contact with them he was injured. The manner of handling the wires, and character of injuries sustained, were fully set out. Appellee alleged that the cut-off box that the foreman said he would go and pull was situated on a pole on Ervay street, north of the point where he was at work, and was a contrivance, the purpose of which, when pulled, was to cut off the electricity from the wires, and deaden them; that said box was defective, and that the wires that should have passed through it had been jumped out of it, or not so arranged

with reference to the wires as to perform, when pulled, the function for which it was intended. Appellee further alleged that, had the said wires and said box been properly arranged, by pulling down the plug of said box said wires could have been killed and freed from electricity, but that the defendants, Dallas Electric Company and E. M. Reardon, as receiver thereof, and the Standard Light & Power Company, had caused the said wires to be arranged with reference to said box so that the portion of said wires south could not be deadened or killed and freed from electricity by pulling the plug in the said box; that each of defendants knew of this condition of the box and wires, and could have known, by the use of ordinary care, that said box and wires were so arranged that said box would not perform the function for which it was designed, and that said wires were live; that defendants, and each of them, negligently and carelessly failed to repair and correct the defective arrangement of said wires and box, and failed to notify plaintiff and the said Wood; and that by reason of such negligence, and the negligence of the said foreman, Wood, in failing to ascertain that said wires and box were so defectively arranged, appellee sustained injuries as alleged. Appellee further charged that the Dallas Electric Company, E. M. Reardon, receiver thereof, and the Standard Light & Power Company, at the time he was injured, and prior thereto, had combined and consolidated, and were in fact operating together as one concern; that each of said defendants was guilty of all the acts of negligence complained of in his petition, and participants therein; that if said work of transferring said wires was not being done and paid for by defendants, or either of them, then the same was being done by some person or persons, or association of persons, to plaintiff unknown, but that said work was being done with the full knowledge, acquiescence, consent, and by authority of defendants, and each of them, and for the benefit of defendants, and each of them; that each of defendants had represented to appellee and John Wood that appellee and said Wood, and each of the gang working with them, was working for defendants, and each of them; and that it was the duty of defendants, and each of

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for injuries resulting from the negligent operation of such properties by the receiver. In order, however, to relieve the corporation from liability in such case, the management and control of the corporate property must be exclusive. If the corporation, with the consent of the receiver, remains in joint control and management of its property, and operates the same in conjunction with its receiver, or if the appointment of the receiver was collusive, and made at the instance of the corporation, for its benefit, and with a view of placing its property beyond the reach of its creditors, or to shield it from liability for injuries inflicted by reason of its negligence, then, it seems, such receiver might be held to be the agent of such corporation, and liable for his acts. *Hicks v. Ry. Co.*, 62 Tex. 41; *Ryan v. Hays*, 62 Tex. 52; *T. P. Ry. v. Johnson*, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

The appellants, by their fifth assignment of error, attack the action of the trial court in permitting the appellee's witness Frank Swor to answer the following questions: (1) "How did it happen that the Standard Light & Power Company were furnishing power to the patrons of the Dallas Electric Company?" To this question and proposed answer the appellants objected on the grounds "that same was immaterial, irrelevant, and not pertinent to any issue in the case." The objection was overruled, and the witness answered: "I cannot say positive why it was. I never saw the papers that were drawn up, but it was naturally assumed that one and both companies belonged to the same people." (2) "State what the custom was, if any, about interchanging power?" And to this question and proposed answer the same objection was interposed, with the additional ground that same was misleading. The court overruled the objection, and the witness stated: "Well, they interchanged power; that is, the Dallas Electric Company put it on the Standard Light & Power Company's wires whenever they saw fit, or needed the use of the power." The objection to this testimony, as appears from counsel's brief, is based upon the proposition that appellant Reardon's special exception "to so much of appellee's petition" as undertook to aver that the two electric companies were operating together as

one concern had been sustained, and that feature of the case eliminated. The appellant is not supported in this contention by the record before us. The judgment of the court recites that "so much of the allegation in the petition as charged partnership between the defendant corporations and a trust between the defendant corporation be, and the same is hereby, sustained, and the said allegation of partnership and trust in plaintiff's petition is hereby stricken out," but that "the exception to the remaining portion of said paragraph be, and the same is hereby, overruled." The remaining portion of this paragraph of plaintiff's petition, among other things, charged that "appellants, at the time appellee was injured, and prior thereto, had combined, consolidated, and were in truth and in fact operating together as one concern." Under the allegations of appellee's petition, we believe the facts sought to be elicited were relevant and pertinent, and that the grounds of the objection urged are not well taken. That portion of the answer of the witness to the first question wherein he states, "I never saw the papers that were drawn up, but it was naturally assumed that one and both companies belonged to the same people," was improper, and suitable objection to such portion of said answer, had it been made, should, and doubtless would, have been sustained.

Appellants' sixth assignment of error relates to the action of the court in refusing to allow the witness Swor to testify, at the instance of appellants, that the "cut-off box," in the condition it was in when the foreman, John Wood, went to pull it, to a man not knowing that the wires had been jumped out of the box, would indicate that the current of electricity was cut off. To this testimony objection was made upon the ground that it called for the opinion of the witness, and the objection sustained. We cannot agree to this ruling. The condition of the box, and what its appearance indicated at that time to Wood, was a material fact in the case; and, if the witness knew what the condition of the box at that time indicated, his statement of it would not be the expression of an opinion or conclusion of the witness, but a fact. We find, however, that the statement of facts shows that this wit-

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ness, as well as John Wood, did testify along this line, and stated, without objection, that, "if I should see no wires going into the box, it would indicate to me that the box was not in use at all; but if I did not know that the wires had been jumped out of the box, and saw that it was pulled, that would indicate to me that the current had been cut off." The witness Wood testified substantially the same. It was an important, if not the controlling, question in the case, whether or not the foreman, John Wood, exercised ordinary care in the matter of ascertaining whether or not the current of electricity had been cut off the wires with which appellee had to work. The determination of this question was for the jury, and we regard the exclusion of the answer of the witness Ben Murrell to the first question presented in appellants' bill of exception No. 4, and seventh assignment of error, correct. The question was: "Would any experienced lineman, under the conditions of the box, as testified to by you, have thought it necessary to climb that pole for the purpose of examining to see whether or not somebody had jumped out the wires?" The foreman, Wood, contented himself, in the examination of the cut-off box, to find out whether or not the current had been cut off, and the wires deadened, by merely looking up at it from the ground, and his conduct involved the question of whether or not, in the exercise of ordinary care to avoid injury to appellee, this was sufficient, or whether the exercise of such care would require him to ascend the pole on which said box was situated, and make a closer examination of the same. This was the very question for the determination of the jury, from all the evidence and circumstances of the case; and the answer sought to be elicited from the witness by this interrogatory would have been but his opinion, and an invasion of the province of the jury. What has been said with reference to the action of the court in excluding the testimony of the witness Swor is applicable to the second question asked the witness Murrell, and the court's ruling thereon, as presented in this assignment of error.

The eighth assignment of error presents the same question con-

tained in appellants' seventh assignment of error, and what has been said of that assignment disposes of this one.

This brings us to appellants' ninth assignment of error. It appears that, while the witness Frank Swor was being examined by the attorney for appellee, the following question was propounded to him: "Now, Mr. Etheridge asked you if a man looking up and seeing the boxes pulled, the wires south of that were dead, would it not also be his duty to see what passed through the box?" Appellants objected to this question on the grounds that it is leading and suggestive of the desired answer, and because involving a question of law. The objections were overruled, and thereupon, and before the witness had answered the said question, the appellee's counsel propounded to him the further question: "Was it not his duty to see that the wires passed through it, so pulling it would kill it?" To this question the same objection—that it was leading, and suggestive of the desired answer, and involved a question of law—was urged, but the objection was overruled, and the witness permitted to answer, "Yes." As said in discussing the action of the court in excluding the answer of the witness Ben Murrell to the first question asked, as shown by bill of exception No. 4 and seventh assignment of error, one, if not the vital, issue in the case, was whether or not John Wood exercised ordinary care in acting upon the appearance of the cut-off box, and in not ascending the pole and making a closer examination of its condition. The question here complained of was clearly leading, and the answer thereto the expression of the opinion of the witness, and should have been excluded. The issue here presented was sharply drawn, and was a most material point for the decision of the jury. Evidently the opinion of this witness was calculated to, and doubtless did, exercise great influence with the jury in arriving at their verdict, and is such an error as will, if for no other reason, require a reversal of the case.

In view of the conduct of the appellants in the management of their business, as disclosed by the evidence and record in the case, we believe no serious error was committed in permitting the ap-

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pellee to testify that he believed he was working for the Dallas Electric Company, Mr. Reardon, receiver; nor in allowing him to state that John Wood and no other person ever told him that he was not working for that company. The bare belief, it is true, of the appellee, that the relation of master and servant existed between him and the appellant Dallas Electric Company, or that such relation existed between said appellant and John Wood, not induced or created by the acts and conduct of appellant, would not have the effect to create such relationship, nor render liable the Dallas Electric Company, as employer of said Wood. If, however, the Dallas Electric Company represented to appellee that he was in its employ, and otherwise, by its acts calculated to and intended to accomplish that object, induced appellee to believe that he was its servant, or that John Wood was its employee, and accepted appellee's services, such acts on its part would, we believe, estop it to deny its liability for its wrongful and negligent acts or such acts of said Wood resulting in injury to him.

A number of questions were asked appellants' witness Bonta, by their attorney, as to the relationship of one Eames to appellants. It seems from the questions propounded that it was the purpose of appellants to show by this witness that Eames represented the bondholders' committee in the reconstruction work and repairs done on the Dallas Electric Company's properties, and not the Dallas Electric Company, nor either of the other appellants. Objections were made to the several questions asked by appellee, on the grounds that each of said questions was leading and called for the opinion of the witness. The court sustained the objections, and in this we believe there was no error. Besides, an inspection of the record discloses that the witness did testify to the facts sought to be established by the questions and answers, notwithstanding the court excluded them at the time here complained of.

One paragraph of the court's general charge reads as follows:

"You are instructed that if you find and believe from the evidence before you that the defendant E. M. Reardon, receiver, and the bondholders of the Dallas Electric Company, were operating and co-operating together in the city of Dallas, at the time of plaintiff's injury, in the matter of furnishing elec-

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tricity to their patrons in the city of Dallas; that is to say, if you believe from the evidence before you that the possession of E. M. Reardon, receiver, was not exclusive, as receiver, of the properties of the Dallas Electric Company, and that he suffered and permitted the Dallas Electric Company, through its bondholders, to have joint possession of the properties for the purpose of reconstructing the plant; and you further find and believe from the evidence before you that the primary boxes had been so rearranged with reference to the primary wires that, when the said primary boxes were pulled, it would not cut off the current of electricity from the primary wires; and if you also find that the defendant, Standard Light & Power Company, had rearranged the primary boxes at the corner of Main and Ervay streets, and that said last-named company had not notified John Wood or the plaintiff of such rearrangement of the boxes—you will find against all three of the said defendants, unless you find that a person of ordinary prudence would not have used any more care than was used by said defendants, or either of them, to avoid the accident."

This paragraph of the court's charge is assailed on the ground that appellee sustained no contract relation to the Standard Light & Power Company, and that, although he and his employer may have had the consent of that company to work upon its poles, yet the only duty that company owed appellee was the negative one of exercising ordinary care to avoid inflicting injury upon him; that the Standard Light & Power Company did not owe appellee the duty of exercising ordinary care to see that he did not sustain injury. It is also claimed that this charge is error, as to the appellant Reardon, if appellee was in the employ of the bondholders of the Dallas Electric Company, or of a committee of such bondholders, and not in the employ of Reardon. The theory upon which this charge is attacked is that appellee was not in the employ of either the Standard Light & Power Company or of E. M. Reardon, and that, although appellee and the persons for whom he was at work at the time he was injured, may have been doing the work with the consent and by permission of that company and Reardon, yet he and they were mere licensees. Ordinarily no other duty is due a licensee than that stated, and admitting, for the sake of argument, that, in so far as the appellants named are concerned, appellee and those in whose employ he was were mere licensees, still we are of the opinion that the above rule cannot be invoked under the facts in this case. This case is unlike one

where a person, by invitation or otherwise, goes upon the premises of another, and is injured by reason of some defective condition thereof, which could not have been reasonably foreseen and anticipated by the owner, or where such person, having gone upon the premises without having been directed to do so, or without the consent and permission of the owner, engages in work with dangerous machinery situated on said premises, and is hurt. In such case we believe the rule contended for by appellants would apply. But here the appellants are engaged in conducting and carrying on business affecting the general public, and necessarily, to some extent, dangerous in its nature and operation. The danger incident to the handling of appellants' wires, and the consequence of coming in contact with wires charged with electricity, was well known to them. The injury to appellee could have been reasonably anticipated by them, and if they had combined and consolidated their business, and were operating together as one concern, or if the appellee, with their knowledge and consent, was permitted to work with and upon the wires and poles so alleged in appellee's petition, we believe, under such circumstances, they, or such of them as so knew and permitted said work, owed him the duty to exercise ordinary care to prevent injury to him while so engaged. Complaint, however, is made of this charge in another respect, and we believe it is subject to the criticism. It will be observed that the court, in effect, instructed the jury that if the possession of E. M. Reardon was not exclusive as receiver of the properties of the Dallas Electric Company, and permitted the Dallas Electric Company, through its bondholders, to have joint possession of the properties for the purpose of reconstructing the plant, and that the Standard Light & Power Company had rearranged the primary boxes at the corner of Main and Ervay streets so that the boxes, when pulled, would not cut off the current of electricity from the wires, and said last-named company had not notified John Wood or the appellee of such rearrangement of the boxes, then to find against all three of the defendants. This charge does not submit any act of the Dallas Electric Company and E. M. Reardon,

or either of them, for the determination of the jury, as negligence on their part, but assumes as negligence *per se* on the part of the Standard Light & Power Company the rearrangement of the primary boxes, and failure by it to notify John Wood or appellee of such rearrangement, and authorizes a verdict against Reardon and the Dallas Electric Company for such negligence. This charge was erroneous, and calculated to, and doubtless did, mislead the jury; and, if the error could have been corrected by other portions of the court's charge, or by requested special charges, we find none in the record to that effect. If the Dallas Electric Company and E. M. Reardon, as receiver, were in joint possession of the Dallas Electric Company's properties, operating the same for their joint account, or permitted the bondholders of said electric company, as their or his agents, to reconstruct and repair such properties, and John Wood was in their employ, or the employ of either of them, as foreman, with authority to control and command appellee in his work, and Wood failed to exercise ordinary care to ascertain the condition of the cut-off box, and see that the current of electricity was in fact cut off and the wires deadened, and this was negligence, and proximately caused appellee's injuries, then we think the Dallas Electric Company and E. M. Reardon, as receiver, would be liable to appellee for the damages so sustained by him. And if the Standard Light & Power Company's business and that of the Dallas Electric Company and E. M. Reardon had been combined and consolidated, and they were acting together in operating said business, as one concern, then it would seem that all would be responsible for the acts of negligence of either, and could be required to respond in damages for the injury, if any, inflicted upon the appellee. If, however, the Standard Light & Power Company had not consolidated its business with that of Reardon's and the Dallas Electric Company's, and was not acting and co-operating with them, but authorized or permitted appellee to work upon its poles and with its wires, and failed to exercise ordinary care to keep said wires and poles in a reasonably safe condition to prevent injury to appellee

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while at work upon and with the same, then it would seem said company would be liable to appellee for the damages sustained by reason of his injuries, regardless of the liability of the other appellants.

In another paragraph of the court's charge the jury were instructed as follows:

"It is the duty of the master to furnish reasonably safe appliances for the use of the servant. It was therefore the duty of the party employing the appellee to use that care which an ordinarily prudent person would have used under similar circumstances to see that the current of electricity had been cut off from the wires which he was handling at the time of the accident; and, if you find and believe from the evidence that the degree of care mentioned last was used by all the defendants, then you will find in favor of all of said defendants."

The converse of this proposition is that, "if all the defendants did not use such care to see that the current of electricity had been cut off from the wires, in that event your verdict should be against all of the defendants." This might be true, or not, according to the finding of the jury upon the facts touching each defendant, under proper instructions submitting the issues applicable to each of them. To this unqualified instruction we do not assent. If an opportunity had been afforded them, the jury might have concluded from the evidence before them that if the Standard Light & Power Company exercised ordinary care to provide the wires with a cut-off box properly arranged to cut off from the wires the current of electricity, when pulled, and had not combined its business with that of the Dallas Electric Company and Reardon, receiver, their duty had been performed, and that it was not required of them to go further, and use such care to see that such box had been pulled, and the electricity actually cut off. The objection to the charge upon the ground that there was no "contract relation" existing between appellee and the Standard Light & Power Company, and that its only duty was to exercise ordinary care to avoid inflicting injury upon appellee, cannot be sustained, under the evidence as shown by the record before us. In so far as the charge is in conflict with the special charge No. 14 given

at the request of the appellants, it is sufficient to say that such error, if any, will not likely occur upon another trial. Practically the same vice exists, as that above discussed, in the paragraph of the court's charge set out in appellants' fifteenth assignment of error, and the same objections substantially urged against it. What has already been said, therefore, with reference to the other paragraphs, is applicable and sufficient to dispose of this assignment. The same may be said of the sixteenth, seventeenth, eighteenth, and nineteenth assignments of error.

By his requested special charge No. 4, as set forth in the twentieth assignment of error, appellant Reardon sought to have the issue submitted to the jury whether or not the committee of the bondholders of the Dallas Electric Company sustained the relation of "independent contractors" to the said Reardon, as receiver, and, if so, to find a verdict for him, "notwithstanding they should further find that said bondholders' committee, or some one in their employ, may have been guilty of negligence resulting in injury to the plaintiff." In our opinion this issue was not sufficiently raised by the evidence to require its submission, and the court's refusal to give it was correct.

Appellants' remaining assignments of error, from the twenty-first to thirtieth, inclusive, relate to the action of the court in refusing special charges asked. These charges, in the main, were upon the weight of the evidence, and relate to matters discussed and disposed of under other assignments, not demanded by the evidence, and contained, for the most part, incorrect propositions of law, as applied to the evidence. In view of the fact that the case is to be remanded, we deem it proper to say, that we think the defendants are entitled to have their theory of the law presented affirmatively to the jury by appropriate instructions. The issues raised by the evidence applicable to each defendant should be, in our opinion, separately submitted to the jury, so that confusion may be avoided, and the facts upon which each one's liability, if liable, rests, may be clearly understood.

The judgment is reversed, and the cause remanded.

General Electric Co. v. Murray.

GENERAL ELECTRIC CO. v. MURRAY.

Texas; Court of Civil Appeals.

1. INJURY TO LINEMAN BY CONTACT WITH LIVE WIRE; KNOWLEDGE OF VICE-PRINCIPAL THAT WIRES WERE CHARGED.—The plaintiff was employed by the defendant electric company in the capacity of lineman. At the time of the injury the defendant company was engaged in reconstructing the lines of an electric light and power company. The plaintiff went upon one of the poles of the electric light company for the purpose of rearranging the wires and placing an arc light thereon, and while thus engaged came in contact with a charged wire and received a shock causing the injury complained of. The plaintiff had no knowledge that the wire was charged with electricity, but this fact was known to the representatives of the electric company. It appeared that the wires upon the pole were improperly placed, and that they were close together upon a cross-arm upon the same side of the pole, when they should have been placed on the opposite ends of the cross-arm to which they were attached. Had they been properly placed the accident would not have occurred. It was held that the defendants were guilty of negligence.
2. INSTRUCTION AS TO BURDEN OF PROOF UPON ISSUE OF CONTRIBUTORY NEGLIGENCE.—The jury could not have been misled by an instruction that the burden of proof upon the issue of contributory negligence was upon the defendants, when they were expressly told that in determining that issue they were "to look to all of the testimony by whomsoever introduced."
3. PLEADINGS; ALLEGATION AS TO DEFENDANT'S KNOWLEDGE OF NEGLIGENT CONSTRUCTION.—Knowledge on the part of the defendants of the defective construction of the wires causing the injury can be reasonably inferred from an allegation that the construction was defective, and that the plaintiff had no knowledge of the same prior to the time he was injured, and that the defendants "negligently and carelessly operated said electric wires, and permitted said deadly current of electricity to be transmitted over and through said electric wires, as aforesaid, without warning to the plaintiff."

Appeal by defendants from judgment for plaintiff. Decided April 14, 1903; reported 74 S. W. 50.

Terry, Ballinger, Smith & Cavin and *James B. & Charles J. Stubbs*, for appellants.

Lovejoy & Malevinsky, for appellee.

Opinion of PLEASANTS, J.:

Appellee brought this suit against the General Electric Company, a corporation, and Walter W. Reed and John Sehorn, as vice principals of said company, to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. The defendants answered by general denial, and pleas of assumed risk and contributory negligence. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff against the defendants for \$7,000.

The record discloses the following facts: Plaintiff was, on the 27th of June, 1900, in the employment of the defendant, the General Electric Company, in the capacity of lineman. The defendant company was then, and had been for some time prior thereto, engaged in the work of reconstructing the lines of the Citizens' Light & Power Company in the city of Houston. The defendant Reed was employed by the defendant company as an electric engineer, and was superintending the work of reconstructing the lines of the Citizens' Company, and was also engineer for the latter company. The defendant Sehorn was employed by the defendant company as foreman of construction. At the time plaintiff was injured the defendant company had control of the entire plant of the Citizens' Company, including the currents of electricity which were sent out from the power house over the wires of said company. Both Reed and Sehorn had authority to employ and discharge the linemen engaged in reconstructing the plant. On the day above named, plaintiff, in the discharge of the duties of his employment, went upon one of the poles of the Citizens' Company for the purpose of rearranging the wires and placing an arc light thereon. While thus engaged he came in contact with a wire charged with electricity, and received an electric shock which rendered him unconscious, and injured him in the manner and to the extent complained of in the petition. Plaintiff did not know when he took hold of the wires that the current of electricity had been turned on, but this fact was known to both defendants Reed and Sehorn. The wires on the pole upon which plaintiff was at work were improperly and negligently

placed upon the pole, in that the two primary or high-voltage wires were placed within a few inches of each other and upon the same side of the pole, when they should have been placed upon opposite sides of the pole and upon the opposite ends of the cross-arm to which they were attached. Had the wires been properly placed, plaintiff would not have been injured, notwithstanding the electric current had been turned on said wires without his knowledge, because no injury would have been caused plaintiff if his person had not come in contact with both of said primary wires at the same time, and this would not have occurred had the wires been placed in their proper position upon the pole. All of the wires upon the pole were similar in appearance, and there was no way by which the primary or high-voltage wires could be distinguished from those of low voltage, and plaintiff had no knowledge of the fact that the primary wires were not in their proper position. Both defendants Reed and Sehorn knew that the wires were not properly placed upon the pole. Plaintiff was a competent and experienced lineman. He testified that he might have removed the wires from the cross-arm without receiving any injury had he known that they were charged with electricity, and that it was good practice to handle all wires as though they were live wires, unless they were positively known not to be charged with electricity, and that such was the general custom among linemen during the time he had been engaged in that occupation. Plaintiff knew that as soon as the reconstruction of the electric plant should be completed the current would be turned on in the day time, and heard the matter frequently discussed by the men engaged in the work. He also knew that when the current was turned on at the power house it went over the entire system of wires. Most of the plant had been reconstructed at the time plaintiff was injured, but the line on which he was at work had not been. The defendants had nothing to do with the original construction of this line, and were not responsible for the improper position in which the primary wires were placed upon the pole. No question is made as to the sufficiency of the evidence to sustain

the verdict of the jury as to the amount of damages sustained by plaintiff by reason of the injuries received by him.

We conclude, from the undisputed facts, before stated, that the defendants were guilty of negligence in putting plaintiff to work upon the wires, by contact with which he was injured, without informing him that said wires were charged with electricity, and that the primary or high-voltage wires were not placed in their proper position upon the pole, and that the evidence is sufficient to sustain the findings of the jury that plaintiff was not guilty of contributory negligence, and that defendant's negligence was the proximate cause of the injury. We shall not discuss appellant's assignments of error categorically nor in detail, but will dispose of of the questions presented in a general way.

The proposition submitted under the first assignment of error is not germane to the assignment, and is therefore not entitled to any consideration; but, waiving objection to the sufficiency of the assignment to support the proposition, the charge complained of is not subject to criticism. The jury could not possibly have been misled by the instruction that the burden of proof upon the issue of contributory negligence was upon the defendants, because they were expressly told that in determining that issue they were "to look to all of the testimony, by whomsoever introduced." As thus qualified, the charge was not obnoxious to the rule announced in *Railway Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Railway Co. v. Martin* (Tex. Civ. App.), 63 S. W. 1089, and *Railway Co. v. Hill* (Sup.) 69 S. W. 136, 5 Tex. Ct. Rep. 232. The charge of the court, as a whole, fully and fairly presents the law applicable to the facts in evidence, and there is no merit in any of the various assignments which complain of portions of said charge.

While plaintiff's petition does not in direct terms charge the defendants with knowledge of the negligent construction of the wires, it alleged a defective construction, and that plaintiff had no knowledge of same prior to the time he was injured, and charges that defendants "negligently and carelessly operated said electric wires, and permitted said deadly current of electricity to be transmitted over and through said electric wires as aforesaid, without

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warning to plaintiff." No exception was urged to the petition on the ground that it failed to allege that defendants had knowledge of the defective construction of the wires at the time they caused the current of electricity to be transmitted through same, nor was there any objection to the introduction of the evidence which shows that defendants had such knowledge. It thus appears that no question was raised in the court below as to the sufficiency of the pleadings to admit this proof. We think the knowledge on the part of defendants of the defective construction of the wires can be reasonably inferred from the allegations of the petition, and, such fact having been shown by the evidence, the trial court did not err in submitting to the jury, as one of the grounds of negligence, the act of the defendants in permitting plaintiff to work upon said wires without warning him of their defective construction. *Railway Co. v. Parr* (Tex. Civ. App.), 26 S. W. 862; *Ins. Co. v. Woodward* (Tex. Civ. App.), 45 S. W. 186.

The allegations in the petition as to the damages sustained by the plaintiff are as follows: "That by reason of his injuries as aforesaid, caused and occasioned as aforesaid, he has become lame and crippled, and has lost the use of his right arm and hand, and incapacitated from ever pursuing his chosen occupation; that he was a competent and capable lineman, and fitting himself for advancement in his chosen vocation as an electrician; that at the time of his injuries he was a strong and healthy man, and earning upon an average of two and one-quarter dollars (\$2.25) per day, and that had he not been injured, as aforesaid, he would in all probability have been able to earn as much as three and one-half dollars (\$3.50) per day as an electrician; that at the time of his injuries he was twenty-seven years of age, and a strong and healthy man, capable of performing heavy manual labor; that by reason of the negligence of the defendants his earning capacity has been destroyed, his health impaired, and he has been caused to suffer great physical and mental pain; that thereby he has been damaged in the sum of thirty thousand dollars (\$30,000), to recover which this suit is brought." We think these allegations are sufficiently broad to sustain a recovery for "the value of the time lost by

plaintiff while disabled from his injuries to work and labor," and the trial court did not err in his charge in submitting to the jury as an element of damage the time lost by plaintiff on account of his injuries.

None of the special instructions requested by the defendants should have been given. In so far as said requested instructions correctly presented the law applicable to the facts in evidence, they were covered by the charge of the court, and their repetition would have given undue prominence to the issue thereby presented.

The assignment which complains of the verdict as being contrary to the evidence cannot be sustained. As stated in our conclusions of fact, the evidence is amply sufficient to sustain the verdict.

We find no error in the record which would authorize a reversal of the judgment of the court below, and it is therefore affirmed. Affirmed.

Reliance upon foreman's assurance.—An experienced lineman felt a current of electricity in a wire and informed the foreman of his squad of its dangerous condition. The foreman thereupon felt of the wire and pronounced it safe. The lineman took hold of the wire again, and again felt the current, but said no more to the foreman, and kept at work until he received a severe shock and injury. It was held that he had no right to rely on the foreman's assurance. *Epperson v. Postal Telegraph Cable Co.*, 7 Am. Electl. Cas. 736, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050.

Standard Light & Power Co. v. Munsey.

STANDARD LIGHT & POWER CO. v. MUNSEY.

Texas; Court of Civil Appeals.

1. **DEATH OF LINEMAN OCCASIONED BY DEFECTIVE INSULATION; LIABILITY OF COMPANY OWNING WIRE TO EMPLOYEE OF ANOTHER COMPANY.**—The appellee was in the employ of a committee of the bondholders of the Dallas Electric Company and was engaged in transferring wires to new poles being erected for the use of the Dallas Electric Company and the appellant, the Standard Light & Power Company. While engaged in this occupation he came in contact with an uninsulated wire belonging to the said Standard Company and was killed by the electric current with which such wire was charged. The Standard Light & Power Company was held negligent in failing to have its wires properly insulated; and could not be relieved from this liability because of the fact that the appellee was not in its employ. It was its duty to so operate its plant as to prevent injury to those who, while engaged in a lawful occupation about such wires, came in contact with them.
2. **AGREEMENT BETWEEN ELECTRIC COMPANIES AS TO USE OF POLES.**—The agreement between the Standard Light & Power Company and the Dallas Electric Company that the latter should be permitted to string wires along the poles of the former was an invitation to the latter company to place its employees at work upon such poles, and the duty was thereby imposed upon the former company to use ordinary care to prevent such employees from being injured by defective wires. There is a failure in this duty when its wires are not properly insulated.
3. **FAILURE TO USE CONTRIVANCE FOR SHUTTING OFF CURRENT.**—It was insisted that the furnishing of an appliance whereby the current of electricity could be shut off from its wires, and the failure to make use of said contrivance to shut off said current by the appellee and his co-employees relieved the appellant from liability. But it was held that the appellant would not be relieved of responsibility for failure to properly insulate its wires, unless it could be shown that the appellee knew of the failure to cut off the current and was guilty of contributory negligence; the defective wires were the proximate cause of the injury, and the failure to cut off the current was not such an intervening cause as would protect the appellant from liability.
4. **DUTY TO INSULATE WIRES NOT TRANSFERABLE.**—The duty imposed of properly insulating wires is incident to the ownership and operation of an electric plant, and is non-transferable.

Appeal by defendant from judgment in favor of plaintiff. Decided November 7, 1903; reported 76 S. W. 931.

Etheridge & Baker, for appellant.

Holloway & Holloway, for appellee.

Opinion by RAINEY, C. J.:

Appellee, Cecelia M. Munsey, widow of Albert Munsey, brought this suit in her own behalf and for the use and benefit of George and Elsie Munsey, surviving parents of said Albert, for injuries causing the death of said Albert. The parties complained of were the Standard Light & Power Company, a corporation, Granville P. Meade, receiver thereof, E. M. Reardon, receiver of the Dallas Electric Company, and the bondholders of the Dallas Electric Company. Proper allegations as to the appointment of the receivers were made. As to the bondholders of the Dallas Electric Company, it was alleged as follows: "That the defendant the bondholders of the Dallas Electric Company is a foreign association, or acting association, composed of numerous persons who are non-residents of Texas, whose names and places of residence are unknown to the plaintiff; that the affairs of said association or acting association are under the management of a certain bondholders' committee, as hereinafter more fully set out, said committee being composed of one or more persons, nonresidents of Texas, whose names and places of residence are unknown to the plaintiff; that A. K. Bonta, who temporarily resides in Dallas county, though a nonresident of Texas, is the general manager and local agent within this State of said association, and is the duly authorized representative of said association and of said bondholders' committee." For cause of action plaintiff claimed that on May 30, 1901, her husband, Albert L. Munsey, was in the employ of E. M. Reardon, receiver, engaged in constructing and repairing the electric wires used by said receiver in furnishing light and electric power to the citizens of the city of Dallas; that while so employed, and in the course of his duties in such employment, he ascended a pole upon which the wires were suspended, and while engaged in the work on said pole came in contact with live wires belonging to the Standard Light & Power

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Company on said pole, which contact caused his death. She claimed that the said receiver was liable for the death of her husband, in that he had unnecessarily exposed her husband to the risk out of which his death ensued, and had failed to avail himself of certain means provided, whereby said wires could have been made safe. As an alternative averment, the plaintiff alleged that, if her said husband was not in the employ of the said Reardon, then he was in the employ of certain bondholders of the Dallas Electric Company, which bondholders had committed the management of their interests in the Dallas Electric Company into the hands of a certain committee of their number; that said committee employed and empowered one A. K. Bonta to take charge of certain work of improvement and reconstruction of the plant of the Dallas Electric Company; and the claim was made that said bondholders, acting through said bondholders' committee, and they acting through A. K. Bonta, had employed the said plaintiff's husband, and that the latter was killed while in the employ of the said bondholders, and by reason of the negligence of the said bondholders, their committee, and the said Bonta, and their other officers and agents. Plaintiff joined the Standard Light & Power Company on the theory that the company owed plaintiff's husband the duty of keeping certain wires which belonged to that company, and which were strung upon a pole upon which plaintiff's husband was working at the time of his death, well insulated, and properly placed on said poles, so that same might be safe for plaintiff's husband to work in and around and over same, and it was claimed that said defendant had failed to discharge the duty so owing by it to the deceased. Granville P. Meade was sued as receiver of the Standard Light & Power Company, it appearing that he had been appointed receiver subsequently to the alleged negligence of the company, which occasioned the death of the said Munsey. The plaintiff recovered judgment against the alleged bondholders of the Dallas Electric Company, without naming them, and against the Standard Light & Power Company. Judgment was rendered in favor of the two receivers, and no cross-appeal is prosecuted by plaintiff from the judgment in favor of said receivers. The bond-

holders and the Standard Light & Power Company have duly perfected this appeal, and now here prosecute the same.

The contention of the bondholders is that the allegations of plaintiff's petition and proof show that there was no such an association or acting association, but, if so, the individual members thereof not having been made parties to the suit, the court should not have rendered judgment against the bondholders of the Dallas Electric Company. No one of the bondholders was made a party to the suit. Citation was had upon A. K. Bonta, who was selected by a committee appointed by the bondholders to represent them in the work of reconstructing the property. An answer was filed by the "Bondholders of the Dallas Electric Company." No one of the bondholders appeared or answered. The only testimony produced on trial tending to show the bondholders to be an association is that of Henry Coke and A. K. Bonta. Henry Coke, a witness for plaintiff, testified: "I do not know, but am satisfied, that all of these bondholders of the Dallas Electric Company are nonresidents, and their headquarters, I think, are in Boston, and most, if not all, of them citizens of Massachusetts. I am satisfied none of them are residents of Texas. I know several of the bondholders personally. My recollection is that they are numerous. I filed a bill in equity in the United States Circuit Court for the Northern District of Texas, as attorney for the trustee of the bondholders, for the foreclosure of their mortgage upon the properties of the Dallas Electric Company. After the filing of the bill, the bondholders, through a committee chosen by them, concluded that it was to their interest to expend some money in the reconstruction of the plant. That committee was Robert T. Payne and Robert T. Platt. I do not remember the terms of the agreement by which the trustees were appointed, but I think under the terms of the agreement one could resign and another be appointed. The personnel of the committee has been changed several times. The only connection that either the bondholders or the bondholders' committee had, either directly or indirectly, with the Dallas Electric Company, was in spending some money in trying to improve its condition. A. K. Bonta came here to superintend the expendi-

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ture of the money. The bondholders were in no sense the owners of the plant. They were not operating it, but with the permission of the receiver appointed by the United States Circuit Court they expended their money in improving it." A. K. Bonta, a witness for defendant, testified: "I am in the employ of the bondholders of the Dallas Electric Company, having been in charge of all reconstruction work done by the bondholders on the plant since March 1, 1901. Something in the neighborhood of \$300,000 has been expended in reconstruction work on the plant. The work was in progress May 30, 1901. Charles Eames had charge of the reconstruction work of the plant for the bondholders in May, 1901. I had charge of the reconstruction after Eames, which was some time after May, 1901. On May 30, 1901, John Woods was the foreman of the gang in which Munsey was working. John Woods was under the direction of Charles Eames. Munsey and the others in the gang in which he was working were working for the bondholders of the Dallas Electric Company."

We think it immaterial whether or not, in legal contemplation, there was an association. The petition alleged that the bondholders were an association, and, the "bondholders" having answered in that name, they are not in a position to question it. But, if it should be conceded that the bondholders is an association, the pertinent inquiry is, did it constitute such a legal entity as rendered it capable of being sued as such without making the members thereof parties to the action? Associations and joint-stock companies "are uniformly held in the United States to be partnerships, subject to be sued as such and governed by the laws fixing partnership responsibility." *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 72 S. W. 875, and authorities there cited. The only distinguishable feature being that "death or withdrawal of one or more members does not affect a dissolution, and the stock can be bought and sold without affecting the integrity of the concern." *Id.* The general rule is, in the absence of statutory provisions "suits by or against unincorporated concerns must be brought in the name of or against all the members." *Cook on Cors.*, vol. 2, sec. 508; *Cyc. Law & Prac.* vol. 4, p. 313; *Ency. Plead. & Pract.* 22, 242. An

exception in equity to this rule is where the parties are numerous, or, if impracticable to make all parties, it is not necessary to make all parties, but it is sufficient to make enough parties to protect the rights of the association. *Gorman v. Russell*, 14 Cal. 531; *Van Houten v. Pine*, 36 N. J. Eq. 133. In some of the states statutes have been enacted which permit actions to be brought against an incorporated association by its common name. But no such statute exists in this state, from which it follows that the common-law rule must prevail in this state, with the equitable exception as stated.

As before stated, unincorporated associations are subject to and governed by the laws of partnership, except as to dissolution by death or withdrawal of one or more of its members and the buying and selling of stock. In the case of *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409, where a suit was attempted to be maintained against a partnership, Justice BROWN, speaking for the Supreme Court, said:

"It is a general rule that suits in courts can only be maintained by and against persons, natural and artificial; that is, individuals or corporation. . . . Unless otherwise provided by statute, a copartnership is not considered a person, and must sue and be sued by its members"—citing a long list of cases; and it was there held, some of the members of the firm having been dismissed, the court had "no authority to enter judgment against the partnership or its property."

Appellee seeks to obviate the force of this rule by the fact that an answer was filed by the bondholders, which gave the court jurisdiction to render judgment against the association, and argue that the right thereunder is a matter for consideration when it is attempted to be enforced. Also that, if the members deny they are an association, the issue should be raised by plea in abatement, and plaintiff given a better writ by stating the nature of the organization and the names of the members. This is the general rule as to nonjoinders or misjoinders of parties, but we think it has no application here. The plaintiff was seeking a judgment against a nonentity incapable of suing, and against which the court had no authority to render judgment, and an answer of such a non-

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entity conferred no further authority upon the court, as, in contemplation of law, nothing was sued and nothing answered. "No issue could be made with a thing that has no legal existence."

Frank v. Tatum, supra.

The foregoing views, being adverse to a recovery against the "bondholders," render a consideration of the other assignments of error presented on behalf of said "bondholders," and we will now consider the assignments presented by the Standard Light & Power Company. The evidence discloses that both the Standard Light & Power Company and the Dallas Electric Company were operating electric plants in the city of Dallas. The wires of both were strung upon the same poles, the poles belonging to the Standard Light & Power Company, which were used by the Dallas Electric Company by permission of the said Standard Company. The "Bondholders of the Dallas Electric Company," desiring to reconstruct the plant, obtained permission of E. M. Reardon, receiver, to do so. They appointed a committee to prosecute the work, which committee appointed A. K. Bonta to represent the "bondholders" in the work of reconstruction. Albert L. Munsey was in the employ of said bondholders when he was killed. In the reconstruction it was understood between the two companies that the Dallas Electric Company should place new poles, to which each company should transfer its own wires. The wires of the Dallas Electric Company were being transferred when said Munsey, an employee of said committee, who was engaged in that work, ascended one of the poles of the said Standard Company, and, coming in contact with one of its uninsulated wires, was killed by the electric current with which that wire was charged by the said Standard Company. Previous to this the Standard Company had arranged an appliance by which the current could be cut off, and had given permission to the Dallas Electric Company to cut off the current when working on the wires; but the Dallas Electric Company had negligently failed to have this done before Munsey was ordered to ascend the pole. The Standard Light & Power Company was negligent in failing to have its wires properly insulated, which caused Munsey's death. Munsey was

an experienced lineman, and the evidence is conflicting as to his use of proper care at the time he was killed. The evidence is sufficient to support the jury's finding that he was not guilty of contributory negligence.

The first contention of the Standard Company that we will notice is that, Munsey not being in the Standard Company's employ, it owed him no affirmative duty to protect him from harm; hence no liability attaches to it for his death. To this contention we cannot subscribe. The Standard Company was dealing with a dangerous element, with which to operate its plant, and it required care to prevent injury to those who came in contact with its wires. When the Standard Company agreed that the Dallas Electric Company should string wires along its poles, it knew, or ought to have known, that the employees of the Dallas Electric Company, in repairing or reconstructing the plant, would, of necessity, come in close proximity to, and probably come in contact with, its wires, and injury might result to them thereby. The agreement to permit the Dallas Electric Company to use its poles was an invitation for that company to place its employees at work in repairing or reconstructing the line, and the duty was thereby imposed upon the Standard Light & Power Company to use ordinary care to prevent such employees from being injured by defective wires. It failed to perform this duty in not keeping its wires properly insulated, which caused the injury, and it is therefore liable.

It is insisted that the court erred in refusing to give to the jury a special charge asked by the Standard Light & Power Company to the effect that said company would not be liable if it had put in a box or contrivance whereby the current could be shut off from its wires, and the employees of the Dallas Electric Company, or of the receiver of said company, or of any of the "bondholders" failed to make use of said contrivance to shut off said current. Under the circumstances the Standard Light & Power Company owed to the deceased the duty to use ordinary care to have its wires properly insulated to prevent injury to him, and it would not be relieved of responsibility for failure to perform that duty,

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though the employees of the Dallas Electric Company were negligent in failing to cut off the current, unless deceased knew of such failure, and was guilty of contributory negligence. The defective wires were the proximate cause of the injury, although the failure of the Dallas Electric Company people to cut off the current may be considered a concurring cause. It cannot be said that the failure to cut off the current by the Dallas Electric Company's employees was such an intervening cause as would protect the Standard Light & Power Company from liability.

The proposition that a private corporation, if liable for death injuries, is only liable for its "immediate personal acts," and not for the negligence of its subordinate agents, etc., has no application here. The act upon which the liability of the Standard Light & Power Company is predicated was the negligence of the said company in failing to keep its wires properly insulated. This was a duty that involved upon said company itself, and the evidence shows that it failed to exercise ordinary care to perform that duty. This duty was incident to the ownership and operation of the plant and nontransferable. *Cole v. Parker* (Tex. Civ. App.), 66 S. W. 135; *Waters-Pierce Oil Co. v. Davis* (Tex. Civ. App.), 60 S. W. 453; *Lynch v. Tel. & T. Co.* (Tex. Civ. App.), 32 S. W. 776; *Rucker v. Oil Co.* (Tex. Civ. App.), 68 S. W. 818.

Complaint is made of the following paragraph of the court's charge, to wit: "The burden of proof is on the plaintiff to show by a preponderance of the testimony that the defendants, or one of them, was guilty of negligence which resulted directly in the death of the deceased." The contention is made that this charge "is confusing, and tends to lead the jury to believe that the negligence of only one of the defendants authorized a judgment against both defendants." There is force in this contention. Conceding the charge to be error, it will not cause a reversal, because the facts indisputably show that the Standard Light & Power Company failed to use ordinary care in maintaining properly insulated wires.

The verdict is attacked for awarding to George Munsey and Elsie Munsey, parents of deceased, \$1,000 each, the contention

being that the proof shows that deceased did not contribute anything toward their support, and there was no proof of their receiving any pecuniary benefit from a continuation of his life. We are of the opinion that this objection is well grounded. The evidence shows that after deceased married he contributed nothing to the support of his parents, and that there was no necessity therefor, and there is no evidence to show that they had any reasonable expectation of receiving any pecuniary benefit from him thereafter, had he lived. The relationship itself does not give a right of recovery. It must be shown that they have sustained some pecuniary loss by the injury upon which the jury could legally base a verdict. *Railway Co. v. Henry*, 75 Tex. 220, 12 S. W. 828; *Railway Co. v. Johnson*, 78 Tex. 536, 15 S. W. 104.

We have carefully considered the other assignments of error presented by the Standard Light & Power Company, and conclude they are not well taken.

We dispose of the cause as follows: The judgment as to the receivers is affirmed. The judgment as to "Bondholders of the Dallas Electric Company" is reversed and remanded, and the judgment as to the Standard Light & Power Company will be reversed and remanded, unless plaintiff will within 20 days enter a remittitur of the \$2,000 apportioned to George and Elsie Munsey, in which event it will be affirmed.

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BLACK V. ROCKY MOUNTAIN BELL TELEPHONE CO.*Utah; Supreme Court.*

1. **INJURY FROM FALL FROM TELEGRAPH POLE CAUSED BY ELECTRIC SHOCK.**—The plaintiff while engaged on a telegraph pole in stringing a wire for the purpose of attaching it to a pole, was shocked and thrown to the ground because of a contact of such wire with a charged wire. The local manager in charge of the work testified, among other things, that he told the plaintiff that he did not want him to attach the wire until the electric current had been turned off, and that if the plaintiff had provided himself with a safety strap, passing around the pole or lower cross arms, it would not have been possible for him to have fallen to the ground. Upon cross-examination the manager was asked if he had not stated in the presence of others that the plaintiff was not to blame for the accident in any way. This question was objected to, but the objection was overruled and the witness answered the question. It was held that there was no error. It was also held that after the manager had testified, in substance, that the accident would not have occurred if the plaintiff had made sure that the current was off before beginning work upon the pole, or if he had used the safety strap to prevent him from falling, it was proper to admit testimony as to the manager's statement that the plaintiff was not to blame for the accident.
2. **OPINION OF WITNESS AS TO USE OF SAFETY STRAP.**—The question of the contributory negligence of the plaintiff in failing to attach himself to the pole by means of a safety strap is for the jury to decide in the light of all conditions disclosed by the evidence. A question to a witness, based upon conditions not disclosed therein, calling for his opinion as to the use of such a strap was held objectionable.
3. **FOREMAN AS VICE-PRINCIPAL.**—A foreman in charge of, and engaged in, the work in which the plaintiff was engaged when injured may properly be assumed to be a vice-principal of the defendant and not a fellow servant of the plaintiff.

Appeal by defendant from judgment in favor of the plaintiff.
Decided August 24, 1903; reported 73 Pac. 514.

Rawlins, Thurman, Hurd & Wedgwood and J. W. N. Whitecotton, for appellant.

Powers, Straup & Lippman and W. N. Dusenberry, for respondent.

Opinion by BASKIN, C. J.:

The plaintiff seeks to recover for personal injuries which he alleges were caused by the negligence of the defendant. The defendant in its answer denied the alleged negligence, and pleaded the contributory negligence and assumed risk of the plaintiff, and that the said accident to and injuries suffered by the plaintiff, if any, were caused either by his own negligence or that of a fellow-servant. From the judgment rendered in favor of plaintiff, the defendant has appealed.

1. At the conclusion of the plaintiff's evidence in chief the defendant moved for a nonsuit on the grounds, in substance, that: "(1) It does not appear from the evidence that defendant was guilty of negligence which was the proximate cause of the injuries to plaintiff. (2) It does not appear that defendant failed in any duty owing to plaintiff. (3) It does appear that plaintiff was guilty of contributory negligence. (4) It does appear that the risk was open and obvious to plaintiff and was assumed by him. (5) It does appear that the accident was one of the risks incident to the employment. (6) If plaintiff was injured by reason of negligence other than his own, it was that of a fellow-servant." It does not appear as a matter of law, from the evidence in chief of the plaintiff, that either of the grounds of the motion is sustained; on the contrary, it appears from this evidence that it is amply sufficient to sustain a verdict for the plaintiff. The motion for a nonsuit was therefore properly denied.

2. While the plaintiff was on a telegraph pole, engaged in stretching a wire for the purpose of attaching it to the pole, it came in contact with a charged wire, and by the shock he was thrown to the ground and injured. Elbert E. Darling, the local manager of the defendant in charge of the work in which the plaintiff was engaged, testified on behalf of the defendant, in substance, that he told the plaintiff that he did not want him to touch that wire or work there until the power had been turned off of the electric wires running underneath; that each lineman performing services that required him to climb poles above ground was required to provide himself with a belt and safety strap before

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going to work ; that the purpose of the safety strap was to prevent persons engaged at work upon the poles from falling to the ground, and when attached to a pole or a cross-arm it would accomplish that purpose ; that he, the witness, did not think it was possible for the plaintiff to have fallen to the ground had he had the safety strap fastened around the pole or lower cross-arms. The evident purpose and tendency of this testimony was to show that the plaintiff himself was to blame for the accident. On cross-examination this witness, after having stated that he had talked with the plaintiff about the accident, and how it happened, was asked, "Did you say, in the presence of Mrs. Jakeman and Mr. Black, that he was not to blame for the accident in any way?" Defendant objected to this question as irrelevant, immaterial, and incompetent, and not cross-examination. The objection was overruled, and an exception taken. The witness continued: "I don't remember of making such a statement. I did not say that, in substance or fact, that I remember of. I don't say that it did not take place, but I do not remember it." The objection was properly overruled.

3. On the re-examination of this witness by defendant, he further testified that "the work that Black was directed to do by Belamy on the 5th was merely the stringing of these two wires. He was directed by me not to do any work on these two poles pertaining to the wires crossing the electric light wires until the current had been turned off." I do not think that Black is entitled to recover in this case, because he failed to perform his duty by securing himself against injury from falling by not making use of the appliance that he knew he was supposed to use. If he neglected to use it, he did so at his own peril, at his own chance. I think the plaintiff disobeyed what was intended to be a safeguard on the line by doing any work on the pole while the current was on. If he had made sure that the current was off before he went up that pole to do any work whatever, as the two wires in question run from this pole here to the pole which he went up, certainly there could not have been any possible way for him to have received this shock ; and, if he had in any manner lost his hold and used the safety strap to prevent him from falling, he certainly would not

have been hurt." The plaintiff, in rebuttal, called Mrs. Jakeman to the witness stand, and after she had testified that she was present shortly after the accident, when a conversation was had with Darling in the presence of the plaintiff, the following occurred: "You may state whether or not, in the course of that conversation, he stated that he did not blame Mr. Black, or that in substance? (Objected to as irrelevant, incompetent, and not rebuttal.) The Court: It is received only on the question of credibility as bearing upon Mr. Darling's statement that he told him not to work there until the electricity was turned off. The objection is overruled." The witness answered that Darling made such a statement. The plaintiff was also permitted, over a like objection by the defendant, to testify that Darling, in said conversation, stated in his and Mrs. Jakeman's presence that he did not blame the plaintiff for the accident. This statement of Darling, in view of his testimony, was admissible.

4. The defendant asked the witness Darling the following question: "Now, as a practical man, experienced for years in this work, as you say you have been, what would you say would be the proper thing for a man under these conditions to do—attach himself, or not?" Plaintiff objected to this question as calling for an opinion upon the merits, which it was the province of the jury to decide. The objection was sustained, and the defendant excepted.

One of the material issues being tried before the jury was whether the plaintiff was guilty of contributory negligence. Whether the fact that the plaintiff was not attached to the pole when he received the shock was or was not contributory negligence on his part, depended upon whether it was or was not proper for him at the time to be attached to the pole, and it was the exclusive province of the jury to decide the matter in the light of all of the conditions disclosed by the evidence. As the question objected to called for the opinion of the witness, based upon conditions (what these conditions were was not disclosed by the question) on a matter which it was the exclusive province of that jury to decide, the objection was properly sustained.

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5. Mr. Bellamy was a foreman of the defendant, and in charge of and engaged in the work in which the plaintiff was engaged when injured. Mr. Allen, a fellow-servant of the plaintiff, was also engaged in the work. The court instructed the jury that "the burden is on the plaintiff to prove, by a preponderance of the evidence, that the witness Bellamy was negligent when engaged in stretching the wires in connection with the witness Allen, and that, in consequence of Bellamy's negligence or carelessness in adjusting the wires, they came into contact with the wires of the power company. If you find that the evidence bearing upon the point is evenly balanced, and does not preponderate in favor of the conclusion that Bellamy was negligent in that respect, your verdict should be in favor of the defendant—no cause of action. It isn't necessary that negligence shall be established by direct evidence. It may be proved by circumstances, if they are such as to establish by fair and just inference to unbiased minds the existence of negligence." The grounds of the defendant's objection to this instruction are: (1) It assumes that Bellamy was vice principal of defendant, and not a fellow-servant of plaintiff. The evidence introduced by plaintiff shows that Bellamy was the foreman of defendant, in charge of and engaged in the work in question. Although the matter was within the especial knowledge of the defendant, it introduced no evidence on the subject. As the matter was not controverted, the court, under the authority of *Jenkins v. Mammoth Min. Co.*, 24 Utah, 513, 68 Pac. 845, did not err in assuming that Bellamy was vice principal, and not a fellow-servant. (2) That it incorrectly stated the rule of proof of negligence by circumstantial evidence. We are of the opinion that this objection is untenable. (3) That there was not sufficient evidence in the case to authorize the court to submit to the jury the question of whether the negligence of defendant, conceding that Bellamy was not a fellow-servant of plaintiff, was proved by circumstantial or legal inference. This objection is disposed of under the first head of this opinion.

6. The following instruction was also given: "You are further instructed that you are the sole judges of the facts in this case,

and the credibility of the witnesses. You have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and frankness, or lack of it, their apparent intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and give credit accordingly. You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matter testified to by him, or that for any other reason his testimony is untrue or unreliable." The appellant contends that the terms "or that for any other reason his testimony is untrue or unreliable," as used in this instruction, were error. While we do not think that those terms were as clear of ambiguity as is desirable in instructions, yet when read in connection with the preceding language, and in view of the evidence, we do not think they were such as could affect the result, and were not, therefore, reversible error.

7. The defendant moved for a new trial, and the denial of the motion is assigned as error. All of the grounds of the motion, except the one in relation to alleged misconduct of a juror in the case, are covered by the exceptions already disposed of. The latter objection is based upon the juror's affidavit alone. In section 3292, Rev. St. 1898, subd. 2, it is provided that "Whenever any one or more of the jurors have been adduced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors."

In *People v. Ritchie*, 12 Utah, 180-195, 42 Pac. 209, this court held that the Legislature by this provision, in effect, enacted that no verdict could be impeached by affidavits of jurors, except when chance had been resorted to in its determination. The Supreme Court of California have so held under the same provision. See cases cited in the above case, and *Saltzman v. Sunset Tel., etc., Co.*, 125 Cal. 501, 58 Pac. 169; *Siemens v. Oakland, etc., Ry.*,

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134 Cal. 494, 66 Pac. 672. In the latter case the case of *People v. Ritchie* is referred to and approved. On the authority of these cases the objection in question is not tenable.

There are other untenable assignments of error of minor importance, which it is unnecessary to specially mention.

The judgment is affirmed, with costs.

BARTON and McCARTY, JJ., concur.

FRITZ V. WESTERN UNION TELEGRAPH CO.

Utah; Supreme Court.

1. **EXPERT TESTIMONY AS TO STRINGING WIRES.**—Expert testimony is admissible for the purpose of showing the number of linemen which should be employed in stringing telegraph wires over feed wires of an electric light company, and as to where such linemen should be stationed.
2. **ADMISSIBILITY OF EVIDENCE AS TO METHODS.**—Evidence is admissible showing the ordinary and usual method existing among telegraph or telephone companies in regard to providing insulators, and as to the number of wires that should be strung at any one time.
3. **EVIDENCE AS TO KNOWLEDGE OF DANGER.**—The plaintiff's intestate was injured from a shock received from a telegraph wire upon which he was working coming in contact with an electric light feed wire. He was directed by the foreman in charge of the work to take the place of another lineman in stretching the wire. The lineman whose place was taken indicated to him at the time that he had just received a shock. A witness was questioned as to whether he seemed to realize the danger, and answered that he appeared as though there was no danger at all. It was held that such evidence was not objectionable as stating the conclusion of the witness.
4. **AUTHORITY OF FOREMAN.**—The work of erecting the defendant's telegraph wires was in charge of a general superintendent who designated a foreman to direct the men under him in the performance of their work. The character of the work required a man to be constantly in charge. It was held that the evidence was sufficient to justify an inference that the superintendent had authority to designate the foreman; that such foreman was acting in such capacity when the accident occurred. Evidence tending to show that such foreman received no greater wages than the other linemen was immaterial as bearing upon the question of whether the foreman was a vice-principal.

Appeal by defendant from judgment for plaintiff. Decided January 15, 1903; reported 25 Utah, 263, 71 Pac. 209.

On October 27, 1898, and for several months immediately prior thereto, the defendants, the Western Union Telegraph Company and the Rio Grande Western Railway Company, were engaged in constructing a telegraph line between Park City and Salt Lake City, along the line of the Rio Grande Western railroad track. The work of erecting the line had been proceeding for about four months, and George Silkett, the deceased, had been in the employ of the defendants as a groundman during all of that time. On October 27, 1898, the day of Silkett's death, the constructing had progressed to a point at Sugar, in Salt Lake county, where the projected line passed over and across the feed wires of the Salt Lake & Ogden Light & Power Company, which wires carried a very heavy voltage of electricity, and where the men, including deceased, were then engaged in stringing telegraph wires. Up to this time nine or ten men had been employed in the gang, including a foreman or an assistant, who had charge of the work and directed the men. There were telegraph and telephone poles standing on each side of the feed wires of the power company at the point where the work was going on; and it was testified that, under such circumstances, it was usual to string only one wire at a time, and to have a lineman on each pole to take up and keep up the slack; also to use rubber gloves for insulators, and a wooden platform for the men to stand on, to insulate them from the ground. None of these things, however, were furnished that day to the men there working. It seems that some of the workmen procured a coil of telegraph wire from a railroad car near by, and placed it in the back of a wagon, whereupon the wagon containing the coil of wire was placed on the west side of the feed wires, with the rear of the wagon facing said feed wires. It then became necessary to uncoil the wire from the reel in the wagon, and stretch the same over the feed wires from the telegraph pole on the west side to the telegraph pole on the east side thereof. There were two coils of telegraph wire on the reel, and by the revolution of the reel the two coils of wire were run out, preparatory to stringing them from pole to pole over the feed wires. A hand line or rope was tied to the ends of the two telegraph wires on the west side of the feed wires. The regular foreman was absent, and one Buchanan, who then directed the men, threw the hand line over the top of the feed wires, and onto the east side thereof. Some of the men picked up this hand line on the east side, and pulled or carried it to the telegraph pole on the east side of the feed wires, preparatory to carrying it up the pole. Buchanan went up a telephone pole on the west side of the feed wires, and put the two telegraph wires, which were being stretched, over the top of a crossarm of the telephone pole, in order to use the cross-arm as a support for the telegraph wires while they were being placed in position. Buchanan then descended the telephone pole on the west side of the feed wires, leaving no one there, and passed over and ascended the telegraph pole on the east side, taking the rope or hand line up the pole with him. After passing over the top of the

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cross-arm of the telephone pole on the west side, one of the telegraph wires became caught under an insulator on the telegraph pole, which was also on the west side, but nearer the feed wires than the telephone pole. Deceased and one George Arden were on the east side of the ground, near the base of the telegraph pole on top of which Buchanan was stationed, and were engaged in pulling on the hand line to keep the wires tight while they were being stretched. The hand line or lead line also went up over a cross-arm on the telegraph pole on the east side, on the top of which Buchanan was stationed, and from there down to the ground into Arden's hands. Buchanan thereupon told Arden to give a little pull on the rope. At this time deceased was standing by Arden's side, at the foot of the pole. Arden responded with a pull, but one wire was caught on the west side, as above stated, and therefore refused to yield. Buchanan thereupon sent deceased to the west side to release the wire which was caught, saying at the same time: "Go over where Jones is, and get hold of the wires, and let them come east." Deceased proceeded to the west side of the feed wires, and took a position near Jones at the rear end of the wagon. Arden continued to pull on the hand or lead line to keep the wires tight. Jones had already shouted to Buchanan that he would go no further, as he had received a shock which alarmed him. It was in response to this announcement of Jones' that Buchanan requested deceased to go over and assist Jones. Jones had been standing on a board insulator at the rear end of the wagon, but, when deceased arrived, Jones stepped from the insulator, and deceased took his place. As deceased stepped onto the board, Jones said to him: "George, she is a cracker jack. I had a touch, and it liked to snake my head off." Thereupon deceased, who had a pair of gloves on his hands, seized the two wires in his hands, and commenced to pull, when a sudden flash came, a current of electricity passed over the wires, and deceased dropped prostrate on the ground and expired. While nobody actually saw it, it is evident that the telegraph wires sagged down and came near to or in contact with the feed wires of the power company, carrying a heavy voltage of electricity, thereby diverting the electric current over the former wires and causing deceased's death. Deceased was unmarried, 30 years old, healthy, industrious, and able-bodied, and supported his father and mother, aged, respectively, at that time, 70 and 65. It was shown that he sent them money right along each month, and on one occasion sent them \$125. Suit was brought by the administratrix of the estate of the deceased against the defendants, claiming that their negligence had caused the death of her intestate. Upon the trial, plaintiff had verdict and judgment for \$4,000, from which judgment this appeal is taken.

L. R. Rogers, M. E. Wilson, and Bennett, Sutherland, Van Cott & Allison, for appellants.

Powers, Straup & Lippman, for respondent.

Opinion by ROLAPP, D. J.:

Upon the trial of this case a large number of errors were assigned, most of which relate to the admissibility of certain evidence now forming part of the record. It appears that, among other things, one of plaintiff's witnesses was permitted, over the objection of defendants, to state how many linemen there should be in stringing wires over feed wires, and where the men should be stationed. The specific objection to the questions which caused these answers was that the testimony was immaterial, irrelevant, and incompetent; that it was not a subject matter of expert testimony, and presented a question of fact, to be determined by the jury from the evidence. Objection was also made that the witness was not qualified to testify; but this part of the objection we need not consider, because the record disclosed that his qualification as an expert was supported by some evidence, and whenever that appears we will not ordinarily review the action of the trial judge in permitting such witness to testify. Rog. Exp. Test. sec. 22, 2 Jones, Ev. sec. 371. But counsel for appellants insist that the subject-matter of inquiry was of such a character as to lie within the common experience of men moving in the ordinary walks of life, and therefore invoke the rule that under such circumstances the opinions of experts are inadmissible, as the jury is supposed to be amply competent to draw all necessary inferences from such common facts testified to by witnesses. While this rule is well established, yet we think counsel are in error in assuming that the subject-matter testified to in this instance necessarily lies within the common experience of men. The inquiry did not simply relate to the mere handling of copper wire between elevated positions, but it involved the question of the effect, method, and skill in handling such wire in close proximity to other wires heavily charged with electricity. We do not think it is true that the average man is acquainted with the effects of electricity, except as they produce almost unexplainable results to the senses. Ordinary men know nothing at all about the methods by which these results are produced. And therefore it may be entirely probable that the ordinary number of

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men and methods used for handling overhead wires in unobstructed places, or places simply obstructed by materials other than electrical, would be no guide whatever as to the number of men and methods that should be employed in handling the same wires when crossing other heavily charged electric wires. In fact, in this very case it appears from the record that slight or temporary contact of the construction wire with the charged wire would have but a slight effect, while a greater or more continuous contact would have a deadly effect. The amount of contact that could be avoided or safely permitted by certain methods of handling the wires is certainly not information within the knowledge of men possessed of average intelligence, but must require knowledge, skill, and judgment possessed only by those who have made the science of electricity a study. It is true, evidence could have been introduced as to the number of men usually employed in handling such wires, and where they would be usually stationed; but such testimony would simply be either corroborative or contradictory of the opinion expressed, and, unless such witness testifying to such facts possessed peculiar skill or judgment in the manner of handling such wires under such circumstances, the testimony would, after all, be of little value in aiding the jury in determining the necessity as to the number of men to be occupied in the stations designated. Nor do we think that the authorities cited by counsel for appellants in support of their position apply to the facts in this case, and the cases cited are readily distinguishable. We agree with the court in the case of *Baldwin v. Railroad Co.*, 68 Iowa, 37, 5 N. W. 918, that it does not require expert testimony to determine the proper method of piling lumber so as to maintain its equilibrium. Any ordinary man could determine that fact. So it is clearly a matter to be determined by a man of ordinary intelligence as to whether the absence of any hand hold upon a freight car, made necessary by certain operations, was or was not a defect. *Dooner v. Canal Co.*, 164 Pa. 33, 30 Atl. 269. In the cases of *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Railway Co. v. Armstrong* (Tex. Civ. App.), 23 S. W. 236, and *Jeffrey v. Railway Co.*, 56 Iowa, 546, 9 N. W. 884, the court

simply hold that expert evidence showing that deceased did not exercise due care, or that the defendant did exercise such care, was not admissible. Neither could there be any occasion for expert testimony to determine whether a fence would be sufficient to turn cattle (*Enright v. Railroad Co.*, 33 Cal. 230), because that certainly is a matter of the most ordinary observation. So the case of *Redfield v. Railroad Co.* (Cal.), 43 Pac. 1117, is not in point, because, while the court stated that particular case "was not a case where opinions were admissible as evidence," yet it further appears from the testimony that the witnesses from whom the expert testimony was attempted to be solicited "could speak only from their observations of the fact, . . . and not as to the reason or motive for doing so," and, further, that "these questions did not call for the opinions of these witnesses as experts, but practically called for the opinions of others as inferred from their conduct." So in the case of *Nutt v. Railway Co.* (Or.), 35 Pac. 653, the real question determined was that it was not proper for a witness to state whether better appliances than those actually used might have been used in the fatal operation; and incidentally the court advanced the opinion that the work of lowering tiles from a car to the ground by rolling them down some skids, aided by a rope wrapped around a stake, did not involve any work of special skill or knowledge, and in this we concur. The case of *Flynn v. Light Co.* (Mass.), 50 N. E. 937, is distinguishable from the case at bar in this: That in the case then before the court the subject-matter of inquiry, upon which expert testimony was sought to be introduced, related simply to the handling of wires from elevated positions, without the additional facts which appear in the case now before us, relative to the intervening and approximate situation of other wires heavily charged with electricity. While the rule laid down by the Massachusetts court in that case might be supported, yet we do not think the rule could properly be extended to include the facts in this case. The same is true of the case of *Cahow v. Railway Co.* (Iowa), 84 N. W. 1056. In that case two men were moving a locomotive tender by means of pinch bars, and, upon one of the men withdrawing his bar, the

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tender started backward and ran over plaintiff. It was there properly held that the question whether two men were sufficient to move the tender with safety was not a subject-matter for expert testimony, because, given the weight of the vehicle rolling upon a declining surface, it would require no man of more than ordinary capacity to determine the number of men of average strength necessary to stem its movements. But that case does not cover all the facts in this case. The ordinary deduction that men would make from testimony relating to the mere weight of the wires, the situation and character of the poles, the number of men actually present, and all the other facts testified to in this case, would be practically useless, unless measured by the skilled information received by them relating to the handling of these men and things in connection with the mysterious factor of electricity. We do not think any further review of the cases cited would be profitable, as they all appear to be readily distinguishable from the case at bar; and, if it were simply a question of precedent, we find that many courts have gone much closer to the border line of admissible expert testimony than did the trial court in this case. Thus it has been held proper to ask an expert witness what course the defendant might have properly pursued for the relief of cattle while suffering from heat in a car. *Lindsley v. Railroad Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692. So, also, as to whether a raft was properly moored to prevent a collision. *Hayward v. Knapp*, 23 Minn. 430. What should have been done by a shipowner to prevent injuries to a cargo. *Guiterman v. Steamship Co.*, 9 Daly, 119. What kind of bridge railing should have been provided. *Taylor v. Town of Monroe*, 43 Conn. 36. What the relative danger was in coupling cars having certain equipments. *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594. What the best way was to handle heavy stones, with a derrick. *Leslie v. Railroad Co.* (Mass.), 52 N. E. 542. And so we might continue to cite a large number of cases where courts of high standing have permitted expert testimony to be given upon questions much more doubtful than those presented in this record. But we are fully convinced that the expert testimony admitted in this case comes

absolutely within the rule, and that no error was committed in overruling appellants' objection in this regard.

Appellants further complain that error was committed in permitting witnesses to answer as to the ordinary and usual method existing among telegraph or telephone companies in regard to providing insulators, and as to the number of wires that should be strung at any one time. The reason assigned for appellants' objection is that it is an improper and insufficient manner to prove the existence of a custom in this respect. We do not think that either the questions or answers objected to contained anything which even tended to show a purpose upon the part of respondent to prove the existence of any custom, or to bind the defendants by its existence. While it is true that the word "usage," "usual," "custom," or "ordinary," is used, yet it is quite apparent that the only object of the inquiry was to inform the jury as to the ordinary manner in which such work is performed, and from such testimony determine whether or not defendants were or were not guilty of negligence. The case of *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644, cited by appellants, does not affect this case at all. That was a case where it was sought to prove an existing custom which would excuse an ordinarily negligent act; and, under those circumstances, it was held by this court that the existence of the custom at the time of the accident must be shown to have existed such a length of time as to become generally known, and must be reasonable, uniform, certain, and not contrary to law. But in this case it is not a question as to any custom existing permitting employees to act negligently, or as to the construction of any appliances, or in fact to any custom, in a legal, technical sense. As we conceive it, it is simply an inquiry as to the ordinary manner in which certain work is done, and we have been cited to no case where such testimony has been held inadmissible, but, on the contrary, courts have held that testimony tending to show that the customary manner of doing certain work (for instance, that a lineman was to determine for himself the safety of poles) was perfectly proper. *Tracy v. Telegraph Co.*

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(C. C.), 110 Fed. 103. So it has been held proper to testify as to the usual and customary time allowed at any station, not for the purpose of establishing any hard and fast rule as to the custom, but merely bearing upon the question as to whether or not a reasonable time was allowed to enable passengers to safely leave a train. *Fuller v. Railway Co.*, 21 Conn. 557.

Appellants also assign as error the following questions and answers admitted in testimony by one of plaintiff's witnesses:

"When you made that statement to him, state what his appearance was,—as to whether he appeared, or not, to realize there was any danger? A. He certainly appeared to me as though there was no danger at all. Q. Describe his appearance as well as you can. A. He just looked at me in a disgusted way, like, as much as to say I did not know anything about it."

Objections were made mainly upon the ground that whether or not deceased realized the danger at that time was a mental question, which the witness had not shown himself capable of judging, and that the statement of witness that deceased looked in a disgusted way was a conclusion. We think that both of these objections are untenable. The statement as to the appearance of another is a fact, and not a conclusion, and any nonexpert witness may be able, under certain circumstances, to determine whether or not another person realizes an impending danger. It appears from the record that, just before deceased took hold of the fatal wire which caused his death, the witness answering the above question stood by the side of deceased, and said to him: "George, she is a cracker jack. I had a touch, and it liked to snake my head off." Then, looking at deceased, the witness says that he did not appear to apprehend or realize the danger he had just mentioned, but looked disgusted. It is urged by appellants that this statement is not only a conclusion, but an erroneous conclusion. Of course, the correctness of the conclusion was a matter of fact to be determined by the jury; but we think that the statements made by the witness might be wholly consistent, and, while not very well or fully expressed, still state the facts as they appeared to him at that time. The witness realized the danger, as evidenced by his

remark; but the total absence of fear or reluctance which might naturally be expected to produce itself upon the face of deceased must have been strongly impressed upon the witness' mind, especially as the deceased's only expression was one of disgust at the offered warning. Of course, whether or not the conduct or the appearance of the man just prior to his death evinced that care for his own safety that should be exercised by an ordinarily prudent person was a question of fact for the jury, but that does not affect the admissibility of the testimony. The experience of men teaches us that knowledge of danger produces external signs of fear, and also that the absence of such fear under impending danger either evinces absence of knowledge of such danger, or a disregard for its consequences. In either event, it is proper for the witness to state the appearance of a person who is subsequently the victim of the natural result of such danger. In the case of *People v. Lavelle* (Cal.), 12 Pac. 226, a nonexpert was asked the question:

"What was the appearance of this man at the time, with reference to his being rational or irrational?"

This was objected to on the ground that the witness could not testify from appearances as to whether the man was rational or irrational. The court held the question to be a proper one, because "the evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was, rather, as to a fact, namely, his appearance at the time."

Appellants also assign as error the exclusion of their proffered testimony as to whether the deceased, an unmarried man, was at the time of his death paying attention to some young lady. Apart from the fact that no offer was made to prove that such attention would probably result in or lead to matrimony, we think the testimony was properly excluded as altogether too remote to affect the question as to whether such condition at the time of his death would affect the support which he was likely to render to his parents, had he lived.

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Appellants also complain that evidence was erroneously admitted respecting the authority which was given by the general foreman, placing Buchanan in charge of the work at the time the accident occurred. The contention is that the general foreman possessed no authority, either express or implied, to employ any subagent. In this statement we cannot agree. We think from the facts in the case that an implied authority did exist. The defendant had employed Mosher to have general charge of the construction of the telegraph line between Park City and Salt Lake City, which required the services of some nine or ten men. Up to about three days before the accident these men were directed by an asserted foreman, who had the key to a box car containing their tools. After his discharge, Buchanan took his place, and had charge of the tools. The evidence shows that the necessity of the work required a man constantly in charge, and that such a charge was vested in both Mosher and Buchanan. Under such circumstances, we think the authority of Buchanan may be implied. It is not necessary in every instance to show that a subagent has been expressly appointed by the master. Says Mr. Mechem, in his work on Agency:

"It is obvious, too, that there are many cases where, from the very nature of the duty, or the circumstances under which it is to be performed, the employment of subagents is imperatively necessary, and that the principal's interest will suffer if they are not so employed. In such cases the power to employ the necessary subagents will be implied. The authority of an agent is always construed to include the necessary and usual means to execute it properly."

In Shear. & R. Neg. sec. 156, it is said:

"The master is, of course, liable for the negligence of one whom his servant employs by his authority to aid such servant in the master's business. Such authority need not be expressed, but may be implied from the nature of the business or the course of trade. Thus such an authority would almost necessarily be implied in favor of a servant intrusted with the whole care of a farm, or the construction of a building, or distribution of a large quantity of goods, or any other task which could not be performed within a reasonable time by one man."

If an exigency exists or arises making it necessary for the proper carrying out of the master's business that a subagent should be employed, then the authority so to do will be implied. *Mickelson v. Railway Co.*, 23 Utah, 42, 64 Pac. 463; *Underwood v. Birdsell* (Mont.), 9 Pac. 922. We think the court committed no error in admitting the testimony complained of, nor in refusing to give the instruction requested by appellants relating to this same subject-matter.

The trial court properly excluded appellants' proffered testimony tending to show that Buchanan received no greater wages than the other lineman. Such testimony was too remote to affect the question of whether or not Buchanan was a vice principal.

"The law requires an open and visible connection between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences." Jones, Ev. sec. 137.

Appellants also strenuously insist that a peremptory instruction in their favor should have been given, because the parents of the deceased, and his only heirs, prior to the commencement of the action, had executed an assignment to plaintiff personally of all their right, title, and interest in the cause of action. We think the trial court correctly refused such instruction. While we do not think that such assignment is or can be valid or of any effect, yet, even if it were, still the real party pointed out by the statute, to wit, the personal representative of the deceased, brought this action, and a judgment herein will be a complete bar to any action now or hereafter brought by the heirs or their assignee. Rev. St. sec. 2912. Besides, this objection was urged too late, and must be held to have been waived. "The objection that the plaintiff in an action is not the real party in interest, as required by the Code, when available by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived." 15 Enc. Pl. & Prac. 713, Rev. St. sec. 2966; *Smith v. Hall*, 67 N. Y. 50; *Spooner v. Railroad Co.*, 115 N. Y. 30, 21 N. E. 696; *Trust Co. v. Brown*, 59 Mo. App. 461.

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We also think that defendants' requests Nos. 8, 17, 15 and 22 were properly refused,—the first two, because the matters therein contained had been covered in other terms by the general charge; the third, because it was not applicable to the evidence; and the last, because of both of the reasons which made it proper to exclude the first three.

Nor do we think that any error was committed in giving instruction No. 7. That instruction reads as follows:

"(7) By 'contributory negligence' is meant such a want of reasonable care and caution on the part of a person injured as directly contributed and caused the injury and without which such injury would not have occurred; and if you find from the evidence that the deceased, George Silkett, failed and neglected to use such reasonable and ordinary care and prudence, and that such failure contributed to the happening of the accident, and without which the accident would not have happened, you should find for the defendants."

While the first part of the instruction is open to criticism, yet we think that, read in connection with the latter part of the instruction, and considered as a whole, it is not misleading, nor does it constitute reversible error.

We see no reversible errors in the record, and the judgment is therefore affirmed, with costs.

BASKING, C. J., and BARTCH, J., concur.

Injury to employee by negligence of fellow servant; "superior servant rule."—In the case of *Knutter v. N. Y. & N. J. Telephone Co.*, 67 N. J. Law. 646, 52 Atl. 565, the question as to the liability of the defendant for the negligent acts of a person occupying a position as general manager was considered. The following is the official head note:

"1. Plaintiff was a lineman in the employ of a telephone company, and was injured while engaged in work with others, under the charge of a foreman. One Runyon was with the party, exercising general supervision and control of the others, including the foreman, and at the same time actively participating in the work. Runyon was called the "district manager," and had general charge of the business of the telephone company throughout a large territory, including the place where the work in question was in progress. In that territory he was intrusted with the hiring and discharge of the employees of the company, including the linemen. There was evidence tending to show that the plaintiff's injuries were the direct result of negligence on the part of Runyon while he was cooperating with the plaintiff

in the work, and at the same time was supervising and directing the work. Held, that Runyon was a fellow servant of the plaintiff, for whose negligence the common employer cannot be held liable.

"2. The 'superior servant rule,' as a limitation upon the master's exemption from liability to a servant for the negligence of a fellow servant, does not obtain in this State.

"3. Where there is negligence in the performance or nonperformance of some duty that is imposed by law upon the master for the safety of the injured servant, the master is responsible, irrespective of the rank of the negligent employee; but, where the negligence is in the performance or nonperformance of some duty that is merely incidental to the general employment, the master is not responsible, although the negligent servant was superior in rank to him who was injured."

BOWERS V. BRISTOL GAS & ELECTRIC CO.

Virginia; Supreme Court of Appeals.

1. INJURY TO LINEMAN IN TRIMMING ARC LAMPS; BURDEN OF PROOF.—The plaintiff's intestate was a lineman in the employ of the defendant, whose duty it was to trim carbons in arc lights, and to replace and adjust carbons and keep the lights in proper condition. Upon discovering that an arc light was not burning upon a certain evening he attempted to start the light, and soon after was found lying on the ground suffering from an electric shock from which he afterwards died. There was no direct evidence as to the manner in which he received the shock. There was evidence showing that the insulation on one of the wires carrying the current of electricity to the lamp was worn off where it entered the left hood pole. It was apparent that in order to produce the shock resulting in the injury, a short circuit must have been made by contact with the uninsulated wire and the carbon of the lamp. The customary and safe method of adjusting carbons is to separate them with a dry stick—a non-conductor. The necessary inference from the facts was held to be that the injury resulted from the decedent's failure to take this precaution coupled with the defective insulation of the wire. The decedent was, therefore, guilty of contributory negligence which precluded a recovery.

The burden rested upon the plaintiff to prove, by presumptive evidence, that the defendant was negligent, and that its negligence was the proximate cause of the injury complained of.

Error by plaintiff from judgment for defendant. Decided September 12, 1902; reported 100 Va. 533, 42 S. E. 296.

Bailey & Byars, W. S. Hamilton, and J. H. Winston, for plaintiff in error.

John W. Price, for defendant in error.

Opinion by WHITTLE, J.:

This action was brought in the corporation court for the city of Bristol to recover damages for the death of W. T. Bowers, the husband and intestate of plaintiff in error, alleged to have been occasioned by the negligence of the defendant company.

The case made by the declaration is that deceased at the time of the accident, in September, 1900, was employed by the defendant company (a corporation owning and operating electric lights in Bristol, Va., and Bristol, Tenn.) to trim with carbons the electric lights along its lines, and to replace and adjust carbons and keep the lights in proper condition. That at Anderson Park, Bristol, Tenn., Bowers, while attempting to reach a point on a pole supporting a lamp, "came in contact with electricity leaking or escaping from the lamp, fixture, frame, and appliances, and wire supplying the lamp with electricity, by reason of which he was shocked and thrown from the pole," receiving injuries which caused his death.

That the defects complained of were known to the company, but were unknown to Bowers.

The company pleaded "Not guilty," and, after the testimony was closed, demurred to the evidence. Thereupon the jury returned a verdict for the plaintiff, subject to the opinion of the court on the demurrer to evidence, and assessed her damages at \$3,500. The court sustained the demurrer and rendered judgment for the defendant, and the case is here upon writ of error to that judgment.

The accident occurred and Bowers died in Tennessee.

It appears that he, in company with his wife and children, was on his way to church on Sunday night, when he discovered that the arc light in question was not burning. Leaving his family at a street corner near by, he went to the park to start the light. He

was soon afterward found lying on the ground at the foot of the pole in an injured condition, and stated that he had received a shock which caused him to fall. He was carried to his home, and only survived some two hours. It is matter of conjecture as to just how the shock was occasioned. The evidence disclosed the fact that the insulation on one of the wires carrying the current of electricity to the lamp was worn off where it entered the left hood pole; and the forefinger and second finger on the right hand of deceased were badly burned,—the second finger on the inside, next to the forefinger.

In the argument much stress was laid on the fact that the pole was in a leaning position, but that circumstance was not made a ground of complaint in the declaration, nor was it proved to what extent, if any, it contributed to the accident. The burden rested upon the plaintiff to prove by affirmative evidence that the company was negligent, and that its negligence was the proximate cause of the injury complained of. *Railway Co. v. Sparrow's Adm'r*, 98 Va. 640, 37 S. E. 302; *Railroad Co. v. Cromer's Adm'r*, 99 Va. 763, 40 S. E. 54.

Conceding that it may have been negligent in failing to properly insulate its wire, it nevertheless plainly appears that that omission could not have been the primary cause of the accident. The evidence shows that contact with the wire at the hood pole, where the insulation was worn off, would not of itself have produced shock, but in order to bring about that result there must also have been connection with the carbon of the lamp, thereby shunting the electrical current from its true course and causing it to make a short circuit through the body of deceased.

It is not pretended that the insulation was defective, except at the one point. It must follow, therefore, that the other point of contact, necessary to form a circuit, was the carbon of the lamp.

When the carbon electrodes are in contact the current is continuous, and in order to produce light they must be slightly separated. The theory of the arc light is that, by separating the carbon electrodes, some of the carbon, or the volatile constituents not expelled by previous baking, become volatilized, and the inter-

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rupted electrical current passes from the one to the other in the form of a curved flame or arc. Intense heat is generated by the current encountering an opposing electromotive force at the arc, and energy is transformed into heat. At the same time a brilliant light is emitted by the white-hot carbon electrodes.

It appears that the customary, proper, and safe way to adjust the carbons is to separate them with a dry stick,— a nonconductor, — a usage well known to the deceased, who had been engaged in that business for nine years.

So that the necessary inference from conceded facts is that the cause of accident was the failure of Bowers to take this obvious precaution for his own safety, coupled with the defective insulation of the wire at the hood pole.

In that aspect of the case, it appears that the contributory negligence of deceased was the proximate cause of the injury; and in such case, upon familiar and well-settled principles, there can be no recovery.

But there is another view of the case equally fatal to plaintiff's pretensions. The evidence showed that deceased, in addition to trimming lamps and doing inside wiring, was line inspector, and thereby charged with the duty of keeping the company apprised of the condition of the wires, poles, and lamps. It was through him alone that the company could have known of the defective insulation of the wire in question. It is insisted that there was a conflict of evidence on that point, and, under the rules applicable to demurrers to evidence, the doubt must be resolved in favor of the demurree. A careful consideration of the testimony shows that there was no such conflict. Mrs. Bowers, Mrs. Sullivan, and the witness Smith, in answer to a general question as to what were deceased's duties, replied that he trimmed lamps and did inside wiring. But it is apparent that they did not undertake to give a comprehensive statement of all his duties. For, in answer to another question, Mrs. Bowers conceded that it was his duty, in addition to what had been enumerated, to perform the service in which he was engaged when the accident that caused his death befell him; and Smith admitted that he did not know what his duties were.

On the other hand, Gannon, the general manager of the company, testified that, at the time of the accident, Bowers was employed in the capacity of lineman, lamp trimmer, and line inspector; that he had been engaged in the two former capacities, as witnesses for the plaintiff declared, but left the service of the company, and, after an absence of about two months, in the latter part of August or the first of September, returned, and was employed by him as lamp trimmer, lineman and inspector; that by the former contract he was paid \$20 per month for trimming lamps, and 10 cents an hour for extra work and repairing, while under the latter he received a fixed salary of \$40 per month. The business of a lamp trimmer is to replace burned carbons, and this is done in the daytime, when the current is off, and when, of course, there is no danger. As line inspector, deceased had entire charge of the line, and it was his duty to inspect the line, and, if out of order, to repair it, if he could; otherwise to report the defect to the company.

The company had no way to inspect its lines and lamps, and no means of ascertaining their condition, except through its agent, and no report was made of this defect.

Ferguson testified that Bowers repeatedly told him that it was his duty to trim the lamps and inspect the line. And Wiley, who succeeded him, said that that was his business.

No attempt was made by the plaintiff to contradict the statements of the company's witnesses as to the duties of Bowers under the second contract. Under these circumstances, it would be, indeed, an unreasonable and narrow view of the subject to hold that the general statements of plaintiff's witnesses as to the duties of deceased were in conflict with those of the company, who gave in detail the precise stipulation of the second contract. Especially is that true in the light of the evidence on both sides that by the original contract the duties of deceased were those of lamp trimmer and inner lineman, and the additional duty to inspect was imposed by the second contract, when his wages were increased in consequence from \$20 per month, and 10 cents per hour for extra work, to \$40 per month.

The witnesses of the company did not deny the correctness of plaintiff's version of the terms of the first contract, but affirmed that there was a second contract by which those duties were increased. The plaintiff heard their testimony, and did not contradict it. The testimony on behalf of the company was in the nature of a confession and avoidance, and the matter of avoidance was not controverted. A conflict of evidence cannot be reasonably and fairly predicated of such conditions.

In many of the states of the Union — possibly in all except Virginia and West Virginia — the demurrer waives all his evidence. But the rule is otherwise in this jurisdiction, and, as is well understood, the demurrant is entitled to the benefit of all his unimpeached evidence not in conflict with his adversary's, and to all inferences that necessarily flow therefrom.

The fact that deceased was line inspector having been established, it follows that any injury arising from defective insulation of wires which it was his duty to inspect was a risk incident to the employment which he assumed, and cannot be made the ground of an action for damages.

Still another question was raised and discussed,— one of more than ordinary interest.

As remarked, the declaration averred and the evidence showed that the alleged cause of action arose in the State of Tennessee. At common law the maxim, "*Actio personalis moritur cum persona*," prevails, and it is insisted that it was incumbent upon the plaintiff to allege and prove her right to maintain this action under some statute of Tennessee.

That this court will take judicial notice of the fact that the territory of which Tennessee is composed constituted a part of the original English colonies of America, and, in the absence of evidence to the contrary, will presume that the common law obtains there. *Nelson v. Railroad Co.*, 88 Va. 976, 14 S. E. 838, 15 L. R. A. 583; *Stewart v. Conrad's Adm'r* (Va.), 40 S. E. 624.

Inasmuch, however, as the views already taken of the case are conclusive of it, a decision of that question is unnecessary.

The judgment of the trial court in sustaining the demurrer to the evidence was plainly right, and must be affirmed.

DEFECTIVE POLES AND CROSS-ARMS.**KELLOG V. DENVER CONS. TRAMWAY CO.***Colorado; Court of Appeals.*

1. **INJURY TO LINEMAN BY FALL OF DEFECTIVE POLE.**—The plaintiff was employed by the defendant as a lineman and was injured by the breaking and falling of a pole upon which he was working. The foreman under whose direction he was working assured the plaintiff that the pole had been tested on the day before and that it was perfectly sound. The defendant company had supplied pikepoles and grabhooks and other appliances for strengthening and bracing poles upon which linemen were at work. The plaintiff made no examination to determine whether the pole was safe or unsafe and did nothing to test it before climbing it, except to place his hand upon it and push it. It was held that since the defendant had furnished the plaintiff with proper machinery and appliances for the bracing and securing of poles, it could not be charged with negligence or lack of reasonable care in this regard.
2. **ASSUMPTION OF RISKS.**—The plaintiff had worked upon poles in the construction and repair of electric lines for many years. He knew that it was his duty to climb poles which had been set in the ground for an uncertain length of time, and that his climbing such poles and taking down and putting up wires would add a strain much greater than the pole would be exposed to in sustaining the wires when they were all in proper position. The risk of falling on account of the weakness of old poles is, therefore, a risk of the business which the plaintiff assumed by his contract to work as a lineman for the defendant. As between the plaintiff and defendant, the defendant was under no obligation to inspect the poles to see whether they were safe or unsafe.

Appeal by plaintiff from judgment for defendant. Decided May 11, 1903; reported 1 St. Ry. Rep. 27, 72 Pac. 609.

S. L. Carpenter and John T. Battom, for appellant.

A. M. Stevenson and Charles J. Hughes, for appellee.

Opinion by MAXWELL, J.:

This was an action by the plaintiff to recover damages for the alleged negligence of the defendant's predecessor, the Denver Consolidated Tramway Company, which corporation, by a consolida-

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tion with another corporation, became the defendant herein. Trial to a jury. At the close of plaintiff's evidence defendant's motion to instruct the jury to return a verdict for the defendant was granted. Judgment was rendered in favor of defendant on the verdict, and plaintiff appeals.

Plaintiff was employed by defendant as a lineman, and was injured by the breaking and falling of a pole upon which he was working. Plaintiff testified that at the time of the accident he was twenty-seven years old, had been working as a lineman for the company for about three months, and had been engaged in the business of lineman and electric work for about eight years. On the day when the accident occurred he was working, with two other employees of the company, resetting poles, changing wires, and placing back guys; that immediately preceding the accident he had ascended a pole and removed a wire therefrom; that this pole had been braced with two pike poles, as Parker, who seemed to be in charge of the work, said it was rotten; that he was then ordered by Parker to splice the wire just removed from the pole, and place it on the pole which subsequently broke. Plaintiff asked Parker if he intended to guy this pole, as there would be an added strain placed upon the pole. Parker replied that the pole had been tested the day before by digging down and testing it with a bar, and that it was perfectly sound. Plaintiff ascended the pole, which stood twenty-five or thirty feet above the ground, put the wire in position, put on a small block and tackle, and commenced to pull up the slack, when the pole broke, and carried plaintiff with it to the ground, seriously injuring him by the fall, and by bringing him in contact with live electric wires. Plaintiff further testified that he was hired by a Mr. Matthews; that Parker was the foreman, and worked with the lineman; that there were pikepoles, grabhooks, and other appliances for strengthening and bracing poles on the repair car at or near the place where the accident occurred; that the pole which broke was ten or twelve inches large at the top, and larger at the bottom; that it broke at the surface of the ground; that before he ascended the pole he made no examination whatever to determine whether the pole was

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safe or unsafe; that he did not know how old the pole was; that it appeared to be like the other pole which was braced with pike-poles; that in the performance of his duties he frequently had to climb poles, reset poles and wires, and remove decayed poles. Elliott, a witness for plaintiff, testified to substantially the same facts; that he made no examination of the pole; that dry rot at the surface of the ground caused it to break; that plaintiff did nothing to test the pole before climbing it, except to place his hand upon it and push it. Two witnesses testified as to the nature, character, and extent of the plaintiff's injuries. The foregoing is a fair summary of the evidence in the case.

In *Floyd v. Colorado Fuel & Iron Co.*, 70 Pac. 452, this court has said:

"Now, when, for the purpose of the work required of his employees, the master has provided upon the premises, and within their reach, suitable implements and appliances in suitable condition, he has, in such regard, discharged his full duty toward them; and he is not responsible for their neglect to employ the instruments he has provided. Having those instruments at hand, they take their own chances upon the consequences of failing to use them"—citing a number of cases.

In other words, if the master has discharged his duty in furnishing the servant with proper machinery and appliances for the performance of the work required, it is no part of his duty to see to it that the servant makes use of such machinery and appliances so furnished. The evidence in this case shows that there were on the repair car, which was at or near the place where the accident occurred and within reach of plaintiff, grabhooks, pikepoles, and other appliances for bracing and securing poles. The evidence also shows that just before the accident occurred a pole which plaintiff had ascended had been secured by means of these appliances. So that it seems clear that under the authorities above cited there was no such negligence or lack of reasonable care upon the part of the defendant in furnishing proper machinery and appliances for the performance of the work as would make defendant liable in this case. Nor can it be said that under the facts in this case the master was required to

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provide the servant with a safe place in which to perform the work; for, where a servant is employed to put a thing or place in a safe and suitable condition for use, it would be obviously unreasonable and inconsistent to require the master to have such place or thing in a safe condition and good repair for the purpose of such employment.

The controlling question in this case is whether the defendant owed to the plaintiff, whose business it was to work upon poles along the line as occasion might require, the duty to inspect its poles, and inform the plaintiff whether or not any of them were so decayed as to be unsafe to work upon. The plaintiff had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant, he must have known that it would be his duty to go upon poles that had been set in the ground for an uncertain length of time. He must have known that such poles would decay, and become unsafe for him to work upon. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining the wires when they were all in proper position. It must be conceded that in this case negligence was not established by mere proof of an accident. The burden was upon plaintiff to show that the defendant's neglect of some duty caused the accident. We are of opinion that the risk of falling on account of the weakness of old poles was a risk of the business, which the plaintiff assumed by his contract to work as a lineman for the defendant; that, as between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed and unsafe, and there was, therefore, no evidence of negligence on the part of the defendant. *McIsaac v. Northampton Electric Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244.

For the reasons above stated, the judgment of the court below should be affirmed.

Affirmed.

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Injury by fall of defective poles.—See, also, the following cases: *Tanner v. N. Y., N. H. & H. R. Co.*, 8 Am. Electl. Cas. 762, 180 Mass. 572, 62 N. E. 993; *Orr v. Southern Bell T. & T. Co.*, 8 Am. Electl. Cas. 777, 130 N. C. 627, 41 S. E. 880; *Sias v. Consolidated Lighting Co.*, 8 Am. Electl. Cas. 787, 73 Vt. 35, 50 Atl. 554. An electric company will not be held liable for injuries resulting to a lineman by the fall of a defective pole, where the defect could not have been disclosed to the employer after the most careful scrutiny. *Essex County Elec. Co. v. Kelly*, 5 Am. Electl. Cas. 360, 57 N. J. L. 100, 29 Atl. 427. But in the case of *Bland v. Shreveport Belt Ry. Co.*, 48 La. Ann. 257, 20 So. 284, in which a lineman was taking down a guy wire from a pole which had been insecurely planted, was killed by the fall of the pole upon him, and it appeared that while the defect of construction was concealed, the officers of the presiding board of management of the company had been notified of the defect; it was held that the company could not excuse itself on the plea of want of notice; that the lineman did not voluntarily place himself in a dangerous position, and was bound to know only patent defects; and that the master did not perform its duty of furnishing suitable appliances.

In respect to the reliance which a lineman in the performance of his duties may place upon the soundness of poles, the following statement was made by the court in the case of *McGorty v. Southern New England Telephone Co.*, 69 Conn. 635, 38 Atl. 359: "It cannot be laid down as a proposition of law that the lineman of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles, and support such as are insecure before permitting their linemen to climb them. Whether it is incumbent upon the master or servant to perform such a duty is usually a question of fact, dependent upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed, and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements and in unsafe places without incurring liability for injuries sustained by workmen who know or ought to know the hazards of the service which they have chosen to enter."

No positive rule can be laid down defining the duty of the company, in all such cases, nor the extent of the risk which a lineman may be held to assume. The question of the liability of electrical companies for injuries to linemen must depend upon the circumstances of each particular case, bearing in mind the rule that it is the duty of the company to exercise reasonable care in the erection and maintenance of its poles, and that a servant in entering upon an employment assumes the usual, ordinary and obvious risks incident thereto; the degree of care required of the company and the extent of the risk assumed by the linemen are to be measured and determined in each case by the terms of the employment, the rules of the company as to the duties of linemen, or the custom of the company as to inspection of poles, or

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other special circumstances affecting the duties and obligations of one or both parties. Joyce on Electric Law, sec. 657.

Inspection of poles by linemen.—In the exercise of reasonable care by an electric company to protect its employees, the company is not required by the law governing the relation of master and servant to inspect the poles upon which its wires are suspended for the purpose of ascertaining whether or not they are in such condition as to render it safe for linemen in their employ to climb upon them. *Dixon v. W. U. Tel. Co.*, 6 Am. Electl. Cas. 370, 71 Fed. 143. In this case the plaintiff was injured while assisting in the erection of a telegraph pole, an occasion having arisen for the casual use of a telephone pole belonging to another company to remove an obstructing wire. It was held that it was no breach of the master's duty to direct an employee to climb the telephone pole without previous inspection of it having been made; the risk is incidental to the service and is assumed by the employee. See, also, *Flood v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603; *Cumberland Telephone Co. v. Loomis*, 87 Tenn. 504, 11 S. W. 356; *Junior v. Mo. Elec. L. & P. Co.*, 5 Am. Electl. Cas. 369, 127 Mo. 79, 29 S. W. 988. Where it is a rule of the company that linemen shall inspect and test poles upon which they are to work, the company cannot be held liable for the fall of a pole, caused by a defect beneath the surface of the ground. *McGorty v. Southern New England Telephone Co.*, 69 Conn. 635, 38 Atl. 359; *Lakti v. Fitchburg & L. St. Ry. Co.*, 172 Mass. 147, 51 N. E. 524; *Essex County Elec. Co. v. Kelly*, 5 Am. Electl. Cas. 360, 57 N. J. L. 100, 29 Atl. 427. In the case of *McIsaac v. Northampton Elec. Co.*, 172 Mass. 89, 51 N. E. 524, it was held that irrespective of custom due care requires a lineman before going upon a pole, the apparent age of which is such as to make it probable that it is weak, to make inspection for decay just below the surface of the ground. In this case the court said in its opinion: "All the evidence tends to show that in the ordinary course of the business the linemen, who were often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the pole as to soundness without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon." But in the case of *McGuire v. Bell Telephone Co.*, 7 Am. Electl. Cas. 769, 167 N. Y. 208, 60 N. E. 433, it was held proper to refuse a charge that the defendant telephone company owed the plaintiff no duty to inspect where it appeared from the evidence that it was the practice of the defendant and of similar companies to make special examination of poles, not by its linemen, but by inspectors employed for that purpose.

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Maryland; Court of Appeals.

1. DEFECTIVE CROSS-ARMS; INJURY TO LINEMAN; LIABILITY FOR DEFECT.—A lineman employed by the appellant telephone company in stringing wires on the telephone poles of the company was injured by a fall from a pole caused by the breaking of the cross-arm upon which he was sitting. It appeared that the cross-arm was defective in that there was a knot at the point where it broke, which to some extent affected the strength of the arm. The cross-arm was painted and the knot was not visible by any ordinary inspection. The cross-arm had been placed upon the pole on the day before the plaintiff was injured. The cross-arms were painted at the time they came into the possession of the defendant. There was nothing to indicate that there was any negligence on the part of the defendant in the purchase, selection or use of this cross-arm, or that there was any apparent difference in its construction or weight from those in use by other telephone companies. It was held that the defendant was not liable for the injury.

Appeal by defendant from judgment in favor of plaintiff. Decided July 1, 1903; reported 55 Atl. 681.

Wm. L. Marbury and *Osborne I. Yellott*, for appellant.

Frank I. Duncan, for appellee.

Opinion by *BOYD, J.*:

The appellee sued the appellant for injuries sustained by him while engaged in stringing wires on the telephone poles of the company, and recovered a judgment for \$3,000 damages. He had been employed in similar work for the Chesapeake & Potomac Company for about nine months. At the time of the accident, he and another employee, named Uhler, were stretching ten wires on a cross-arm with what are called "jack straps," there being five wires on each side of the pole. The cross-arm was made of wood, and was about 10 feet long, 3 1-4 inches wide, and 4 inches thick. There were ten holes bored in it, about a foot apart, and 1 1-2 inches in diameter, in which wooden pins were inserted to hold the insulators for the wires. The arm was fastened to the pole

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by a bolt, was supported by braces on either side of the pole, and was about 35 feet from the ground. At the time of the accident the appellee was sitting on the cross-arm, with his feet resting on the lower arm, upon which wires had not been stretched. He was towards the outer end of the arm, and was working with the strap around the third pin, when the arm broke, throwing him down and seriously injuring him. The appellee stated that he could not say exactly at what point the arm broke, but it was on the side he was sitting; and one of his witnesses said he thought it was at the fourth pin from the end, and another that it was at the third or fourth. The defendant offered no testimony. There are eighteen bills of exception in the record, seventeen of which present the rulings of the court on the admissibility of testimony offered, and the last embraces the prayers. Two prayers were offered by the plaintiff, which were granted, and twenty were offered by the defendant, twelve of which were rejected, one conceded, and the remaining seven granted. Under the view we take of the case, it will not be necessary to consider all of the exceptions.

It cannot be doubted that a knot, which was discovered after the accident, in the cross-arm at a point where one of the holes was bored, was, at least to some extent, the cause of the accident; but the responsibility of the appellant must depend upon the further question whether it was negligent in furnishing the cross-arm with such defect in it. It must be admitted that there was no apparent defect in the arm, and it is well established by the testimony that the knot was not visible by any ordinary inspection. The plaintiff testified that he did not notice anything about it that indicated it was not safe, and that it looked very similar to the creosote bars he had been accustomed to while working for the Chesapeake & Potomac Company, which used creosote and red-painted white pine arms. The former he said weighed from 75 to 100 pounds, while the latter were much lighter. The arm that broke had been put on the pole, the day before the plaintiff was injured, by some of the other employees. He said: "The wires in question were thought to have been permanently deadened before he went up the pole. That they were fastened to the insulators, but it was found that

they were not pulled hard enough, and he and Uhler went up to take up the remaining slack. They had to unfasten them and redden them. The jack straps were used to take in slack which could not be taken in by hand pull." When the wires are spoken of as being "deadened," it is meant that they did not go beyond that pole, but were fastened to that arm.

In determining whether the appellant is responsible, it will be well to first ascertain the character of the cross-arms furnished by it to its employees, the opportunities which its agents had to be assured that they were safe, what they actually did in that respect, and the use the appellee was making of this particular one at the time of the accident. Charles F. Knox, who was "gang foreman" of the plaintiff and the other linemen engaged in the work, testified he was sent by the company to take charge of this construction work at Towson; that "he went to the company and asked them what material he was to use in the work, and was told to use the material then on the ground, the cross-arm which broke being one of those already in the work, on the pole." Joseph S. Caskey said he was at the time of the accident "head assistant to Mr. Holliday, the material boss," who, the record shows, was reported sick the day before Caskey testified. The material boss had full charge of all materials, and saw that the men received bolts, cross-arms, screw-drivers, wrenches, and other things they needed. Caskey testified that the cross-arm which broke came from their supplies—was sent from their High street yard. He examined it after the accident, and said that the knot was not visible before the arm was broken—that the paint obscured it—and in answer to the question whether the paint or creosote, whichever it was, was on when it came into the possession of the company, replied: "It was on it when it came into the possession of the company, to the best of my knowledge." The question being, in substance, repeated, he said: "I saw the arms when they came in there. They were painted, to the best of my knowledge." He also said: "The holes came also in them when they were purchased." Mr. Knox also testified that the knot referred to weakened the seven-eighth inch strip by the pin, but said it was not the mistake of the man who bored the hole next to the

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knot, as all ten holes were bored at the same time by machinery; that the knot was not visible to the plaintiff when he went up on the arm, because it was painted; that it could have been seen on two sides if the paint had been removed; that knots in wood were not an uncommon thing sometimes. He further testified that he never knew a cross-arm to break except when broken by storms. In answer to the question how this arm compared in size and quality with the ordinary cross-arms that are used in the telephone business for the construction of lines, he said: "In size, I think it was about the regular size. I didn't notice any difference in them. They were light in weight; very much like the regular old-style red arm; about the same weight." He also testified "that the arms referred to were much lighter in weight than the creosote arm, but, as to quality, a good red arm would be as good as a creosote arm, the arms in use by the defendant company being lighter than the creosote arms," and "that all cross-arms were bored similar to those used by the defendant company, though some had small iron pins in them, but such were not generally used." It is true that he said that this particular arm was not, in his opinion, safe for the purpose it was sent there, but he explained that by saying that he thought it was not safe by reason of the knot being where the hole was bored, which weakened it; and Caskey spoke of the wood as inferior—called it a "culling"—but he ascertained that from his examination of the arm after it was broken.

It must be remembered that all the testimony offered was produced by the plaintiff, and that both Knox and Caskey were in positions to know the facts; and, as we understand the record, neither of them was in the employ of the defendant when they testified. They certainly showed no bias in favor of the company. In addition to what we have already referred to, it is shown that there were other cross-arms at hand, and that the lineman could get them as desired; and a witness (Archer) said "the arms used by the defendant on its work at Towson were about the same size as those used by the Chesapeake & Potomac Company." There is nothing whatever to indicate that the defendant did not procure its cross-arms as other companies do, and it cannot be said, from anything

we have found in the record, that there was any negligence on the part of the defendant in the purchase, selection, or use of this cross-arm, or that there was any apparent difference in its construction or weight from those in use by other telephone companies. As we have seen, it was proven by the plaintiff that the knot was concealed by reason of the paint, and it was shown that it is customary for such companies to purchase arms already painted, and with the holes already bored. It would hold a telephone or other company using such arms to a very unreasonable responsibility to say that it was negligent in purchasing arms in that condition, especially when the evidence shows, as it does here, that it is so unusual for them to break, excepting as the result of storms, and it is probable that age and use tend to weaken them so as to cause them to break under those circumstances. But these arms were not only handled at the yard, but the men putting them on the poles had an opportunity to examine them; and those who string the wires can, to some extent, test them before putting their weight on them. In this instance it is shown that this arm was fastened to the pole the day before the accident, and wires were actually stretched on it, and it did not then break. Nor did it break with the lineman, Uhler, who was at work with the plaintiff on the other side of the pole. There would seem, therefore, to be no doubt that it broke by reason of the knot being at one of the holes and the great strain it was subjected to by the weight of the plaintiff and the use of a jack strap, which enabled him to exert so much more power than he could have done with his hands.

Courts naturally and properly hesitate to withdraw cases from the consideration of the jury, which is the tribunal, under our system to pass on facts; but when all the testimony in the case is offered by the plaintiff, and it establishes facts that preclude a recovery it is the duty of the court to so instruct the jury, when requested, and we think there was error in the court below in not doing so in this instance. It did instruct them that, if they found the facts in the twelfth prayer, the plaintiff could not recover; and, although the plaintiff and his witnesses proved every fact therein submitted, the jury found for the plaintiff. The only thing there

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mentioned that could be said to be at all in doubt, under the evidence, was whether the jury believed the knot was the immediate and proximate cause of the injury. If they found in the negative, then, unquestionably, the defendant could not be held liable, for there was nothing else to base the claim of negligence on; and, if they found in the affirmative, they were instructed to return a verdict for the defendant. We refer to this to illustrate the danger of a jury being allowed to conjecture or speculate. If this defendant is to be held liable, then it must be because some one of its agents did not detect a defect which all the testimony of the plaintiff, including his own, tends to show could not be detected by any means that are shown to be used in the kind of work the defendant is engaged in. If there be any test which might and ought to have been used, which would have disclosed the defect, the plaintiff should have so proved; but, in the absence of such proof, the jury was not at liberty to assume that there was, and to speculate on the subject.

For the sake of humanity, and for the protection of those who are required to occupy perilous positions in order to gain a livelihood, and have no means for the protection of themselves, employers should not be permitted to trifle with the safety of their employees, or, for the sake of dollars and cents, withhold from them such safeguards as can be reasonably demanded of them; but the law does not exact of them unreasonable care and caution, and does not make them insurers of their employees' safety. As was said in *Wood v. Heiges*, 83 Md. 267, 34 Atl. 872, and repeated in *South Baltimore Carworks v. Schaeffer*, 96 Md. 88, 53 Atl. 665:

"When a servant engages to perform certain services for a compensation, it is implied as a part of the contract that, as between himself and his employer, he assumes all the risks incident to the service. And these risks include such as arise from the hazardous character of the service, and from the negligence of other servants in the same employment, even though they may be in a different grade. But the master himself is bound to use ordinary (that is, due and reasonable) care and diligence to provide proper materials and appliances to do the work, and in the selection and employment of competent and careful fellow servants."

In the latter case, in which an employee was injured by a knife flying from a molding machine, which was alleged to have been caused by defective bolts, we said :

“ It is obvious, therefore, that the plaintiff must not only show that he was injured because the bolts were defective, but he must go one step further, and offer evidence legally sufficient to show that the defendant did not use reasonable care in procuring proper bolts for the adjustment of the knife.”

The appellee seeks to distinguish this from *Schaeffer's Case*, because in the latter the defendant placed witnesses on the stand to explain the breaking of the bolts, as well as it could, while in this case it did not call any witnesses. But it must be remembered that the plaintiff himself called those who were apparently most familiar with the steps taken by the company, excepting, perhaps, Mr. Holliday, who, the record shows, had been reported sick. In addition to that, the plaintiff's testimony furnished all the explanations that we have any right to infer could be made, and established such facts as negatived the probability of being able to discover such a defect as caused this accident by any inspection that could be reasonably required. When a plaintiff proves such circumstances as furnish *prima facie* evidence of negligence on the part of the defendant, the law requires him to explain them ; but, when the plaintiff himself furnishes that explanation, there is no occasion for the defendant doing so. This plaintiff not only attempted to show that the arm broke by reason of this defect in it, but established beyond all controversy that the defect was not visible, and that such was the case when the defendant purchased the arm. If it was possible to discover the defect by some customary method of inspection that was not used, then the plaintiff should have established that fact. As was said in *Schaeffer's Case* :

“ It was the duty of the plaintiff, if he relied on failure to inspect, to have offered some testimony which would have justified the jury in finding that the defect causing the injury was one which could have been discovered by the usual and ordinary methods of inspection, commonly adopted by those in the same kind of business which was conducted by the defendant.”

So, without discussing the alleged contributory negligence on the part of the plaintiff, and other questions presented by the record,

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we are of the opinion that the case should have been withdrawn from the jury because the plaintiff failed to establish any legally sufficient evidence of negligence on the part of the defendant; and, as the plaintiff cannot recover, it would be useless to remand the case. Judgment reversed, without awarding a new trial; the costs to be paid by the appellee.

TANNER V. NEW YORK, NEW HAVEN & HARTFORD R. CO.

Massachusetts; Supreme Judicial Court.

1. **INJURY TO LINEMAN BY FALL OF POLE; ASSUMPTION OF RISK.**—The plaintiff was a lineman employed by the defendant in changing the telegraph wires from old poles to new. In the course of his employment he had climbed a pole and thrown off the wires. They fell across a guy wire connecting the pole with a fence. When directed by the overseer in charge of the work, he cut the guy wire and thereupon the pole fell and the plaintiff was injured. It was assumed that the overseer in charge of the work was a superintendent within the meaning of the Employers' Liability Act under which the action was brought. It appeared that the plaintiff knew the tendency of poles which had been set for a long time to rot beneath the surface of the ground, and had knowledge of the methods used in testing poles before climbing them. No such test was made by him or by the overseer. It did not appear that he relied upon any such inspection by the overseer. It was held that the risk of the employment was assumed by the plaintiff and that under the circumstances of the case the direction by the overseer to cut the wire did not carry with it an assurance of safety.

Exceptions brought by defendant from a verdict for the plaintiff. Decided February 28, 1902; reported 180 Mass. 572, 62 N. E. 993.

Daggett & Young, for plaintiff.

Chas. F. Choate, Jr., for defendant.

Opinion by BARKER, J.:

The plaintiff was one of four men, who, at the time of the accident, were at work for the defendant transferring wires from an old set of poles in the railroad yard at North Abington to a set of new poles, which had been put up for the purpose of carrying the same wires. The reason for setting the new poles and transferring the wires to them was that the old poles were of no more use because they were old, and this the plaintiff knew. His part of the work was to climb the poles, change the cross-arms from the old poles to the new, throw the wires from the old pole and leave them hanging, and then walk to the new pole, put the wires on his shoulder, take them up the new pole, and put them in their places on the cross-arm. The new poles were at different distances from the old ones,—from four to ten feet or more,—and not so near that the wires could be thrown from the old pole to the new. There were both telephone and signal wires on the poles. One of the four men was at work upon ground wires connecting the rails to the poles, and this man was some 200 yards away from the plaintiff. Another was upon the ground near the pole on which the plaintiff was at work, and was expected to attach to a rope anything which the plaintiff might want so that the latter could haul it up. The fourth man acted as an overseer of the work of the others, going back and forth between the places where they were working. The plaintiff had climbed a pole, and thrown off the wires. They fell across a wire guy connecting the pole with a fence. The overseer was then standing on the ground near the foot of the pole, and the plaintiff told him the wires were crossed on the guy, and asked him what he should do with it. The overseer answered, telling the plaintiff to cut it, which the plaintiff did, and thereupon the pole fell. The only witness who was called was the plaintiff, and his testimony constituted the whole evidence. The suit was under the employer's liability act, and the ground on which the plaintiff relied was that the overseer's order to cut the stay was a negligent act of superintendence.

We assume in favor of the plaintiff that the overseer was a superintendent within the meaning of the act, and that his direc-

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tion to cut the stay might be found to be an act of superintendence, and not a mere piece of advice given by one man to another. The question, then, is whether, under the circumstances, the order fairly could be found to have been understood by the plaintiff as bearing upon the question of his safety in executing it. The plaintiff knew that the pole was an old one, to be put out of use, and to be taken down, because of its age. He admitted in his testimony that he knew the tendency of poles which had been set for a long time to rot beneath the surface of the ground. He knew a number of practicable ways in which he could have tested the poles before climbing them, and so have ascertained whether this one was decayed and weak. No test of the strength or condition of this pole or of any of the poles was made by the plaintiff, and none was made or was expected to be made by the overseer or by any of the workmen. It could not be found fairly that the plaintiff went up the pole relying upon any examination or test of its strength or condition by the overseer or by any one, or expecting or having any reason to expect that such an examination would be made or had been made by any one while he was upon the pole. His question to the overseer was not whether it would be safe for him to cut the guy, and it could not be found fairly that the order was intended to be an expression that it was safe to cut it, or that the plaintiff had a right to interpret the order as such an expression. The dismantling of a set of old poles to be disused because of their age was an employment which exposed the plaintiff obviously to the risk of being hurt by the fall of a decayed pole in a greater degree than that to which a lineman is ordinarily exposed, and this risk, he, upon the testimony, clearly knew and accepted. It is also clear from the testimony, that he did not ascend the pole relying upon any examination of any one for its safety, or upon any duty or practice of the overseer to make such an examination. He had had several years of experience in similar work, and it is plain from his testimony that he himself knew as much about the safety of the pole, and the danger of its falling if he cut the guy, as the overseer knew, and he must also have known that the overseer had made no examination of the

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pole with reference to its strength or condition, and that the plaintiff knew that the overseer had no other or better means of judging of its safety than he himself had. We are therefore of opinion that when he cut the guy in compliance with the order he had no right to rely upon the order as implying any assurance from the overseer, and that in cutting the guy the plaintiff acted at his own risk. As the work was conducted, the plaintiff did not rely at all upon any implied or express representation on the part of his employer or of the overseer that any pole which he ascended would furnish him a safe place for his work. This distinguishes the case from those cited for him in which it has been held that workmen digging trenches may rely upon the obligation of the employer to shore up the sides or to give warning. See *Hennessey v. City of Boston*, 161 Mass. 502, 37 N. E. 668; *Coan v. City of Marlborough*, 164 Mass. 206, 41 N. E. 238; *McCoy v. Inhabitants of Westborough*, 172 Mass. 504, 52 N. E. 1064. It was not a case in which, while he must be exposed in his work to sudden danger, he had a right to expect also a warning which would enable him to escape the danger. See *Davis v. Railroad Co.*, 159 Mass. 532, 34 N. E. 1070; *Lang v. Terry*, 163 Mass. 138, 39 N. E. 802. It was not a case in which the act of setting the workman to do a particular thing in a particular place might be understood fairly by the workman to be an assertion that the place was safe. See *Tremblay v. Construction Co.*, 169 Mass. 284, 47 N. E. 1010; *Dean v. Smith*, 169 Mass. 569, 48 N. E. 619. Nor could the jury have found an explicit assertion on the part of the overseer that there was no danger, as in *McKee v. Tourtelotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542. The fact that the plaintiff knew all that any one knew about the condition of the pole and the danger of its falling if he cut the guy distinguishes the case also from *Millard v. Railway Co.*, 173 Mass. 512, 53 N. E. 900. We think it was wrong to allow the jury to find for the plaintiff if he cut the guy relying upon the overseer's order.

Exceptions sustained.

Injury to lineman by fall of pole; assumption of risk.—In the case of *Krimmel v. Edison Ill. Co.*, 130 Mich. 613, 90 N. W. 336, the plaintiff's

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intestate was a lineman who had been in the employ of the defendant for nearly four years. The following are the facts in the case:

A street railway company had constructed its railway in a street which had been widened between curb and curb. The railway company had strung its wires upon hollow wrought-iron poles about twenty-two feet high and six inches in diameter. The defendant company had its wires upon cedar poles. When the street was widened the cedar poles would not be near the curb; and to get rid of some poles the board of public works of the city required the electric light company and the street railway company to join in the use of poles at certain localities. At the point where the accident occurred it was necessary to make the pole higher so that the electric wires should not come in contact with the trolley wires. For this purpose oak poles were turned at the bottom to a size that would enable them to fit snugly in the inside of the wrought-iron poles with a shoulder upon them that rested on the top of the wrought-iron poles, and projected beyond the shell of the iron, which projection, it was expected, would keep out all water from the joint so made. The pole was then painted black. The pole in question was extended nine feet and eleven inches above the wrought-iron pole and towards its upper end carried two cross pieces, which, in turn, carried wires. On the day of the accident the plaintiff's intestate had ascended the pole for the purpose of adjusting the electric wires and was proceeding with his work when the wooden part of the pole broke just below the top of the wrought-iron portion of the pole, and he was precipitated to the pavement below. It was found upon examination that the pole was affected with dry rot. The pole had been erected, at the time of the accident, for a period of about four years. There was no evidence that the pole had been inspected previous to the accident except by the linemen in the course of their work. From the testimony it appeared that it was a part of the duty of the linemen to inspect the poles and wires. There was no defect in this pole ever reported and the company had no knowledge of the defect. The evidence also showed that the practical way to inspect the pole and determine whether it was safe or not, was for the lineman before leaving the iron portion of the pole to reach up and shake the wooden portion of the pole, and that by so doing he could tell whether it was safe for him to go upon it. The only other way to make an inspection was to lift out the wooden portion, which was difficult because of the wires attached to the pole. After the accident an inspection of this character was made of the other poles and none of them were found to be defective and no other accident of the kind had ever occurred. It was held that since there was no evidence showing that any other system of inspection more practicable than the one which it was the duty of the plaintiff's intestate himself to make could have been made, or that the company had any reason to suppose that there was any defect in the pole, that the plaintiff's intestate assumed the risk of his employment and that no recovery could, therefore, be had for the injuries sustained.

As to employers' liability, as affected by so-called Employers' Liability Acts, see Slater and Alger's Employers' Liability Act of New York.

ROBERTS V. MISSOURI & KANSAS TELEPHONE CO.

Missouri; Supreme Court.

1. INJURY TO LINEMAN BY BREAK IN CROSS-ARM; ASSUMPTION OF RISK.—A lineman who climbs upon the cross-arm of a telephone pole for the purpose of repairing the wires attached thereto, whose duty it is in the course of his employment to inspect the sufficiency of the cross-arm to bear his weight, and who makes no such inspection, assumes the risk of his employment and cannot recover for injuries received in falling from the pole because of the breaking of the cross-arm.
2. FAILURE TO USE SAFETY BELT.—The plaintiff knew that linemen ordinarily wore safety belts furnished by themselves, when working upon telephone poles, so as to prevent a fall if the cross-arm broke. His failure to equip himself with such device was contributory negligence.

Appeal by defendant from an order setting aside a nonsuit suffered by the plaintiff. Decided December 17, 1901; reported 166 Mo. 370, 66 S. W. 155.

Action for \$11,000 damages for personal injuries received by the plaintiff on September 22, 1898, while in the employ of the defendant as a lineman. Upon a trial in the Circuit Court of Buchanan county the plaintiff suffered a nonsuit with leave, which that court afterwards set aside, and from which ruling the defendant appealed.

The petition alleges that the defendant, as a part of its plant, has a lead or line of wires in the city of St. Joseph running from the south part of Eleventh street to and through South Park; that such wires are suspended by cross-arms attached to poles about 30 feet high, and placed at intervals of about 100 feet; that the cross-arms are made of wood, about 2 1-2 inches wide, about 4 inches deep, and about 8 feet long, and are fastened to the poles about 20 feet above the ground; "that this plaintiff was employed by the defendant on said 22d day of September, 1898, to fix and securely fasten the wires of said lead to the cross-arms above described, and to tighten the wires on the cross-arms above defendant's where they sagged down upon those of defendant; that in pursuance of his duties on said day he was negligently ordered to get upon one of said poles and cross-arms on said above-described line or lead in South Park, a suburb of the city of St. Joseph, as aforesaid, by defendant, acting through its foreman and manager in charge of this plaintiff and other men working with plaintiff on this line or lead on said day; that, in order to do the act and perform the work required by defendant, plaintiff ascended to the top of said pole, and was compelled to stand upon the cross-arm above described of said pole; that said cross-arm of wood had negligently been placed upon said pole in a rotten, unsafe con-

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dition, and remained there two years or more, and was or had negligently been allowed to become rotten, dangerous, and unsafe, which was well known to defendant, or might have been discovered and known to defendant by the exercise of ordinary care and diligence on its part, but was not known by plaintiff; that this plaintiff, while standing upon the cross-arm, as above stated, at the direction of defendant, and in the performance of his duty, was violently thrown and precipitated to the ground by reason of the said rotten cross-arm breaking, and by reason of the negligence of defendant as aforesaid, thereby crushing, mashing, and breaking this plaintiff's leg at the ankle." The answer admits the incorporation of the defendant, and that the plaintiff was in its employ as a lineman at the time he was injured; denies generally the allegations of the petition; and pleads affirmatively—First, that the injury was occasioned by one of the hazards or perils ordinarily incident to the employment of a lineman in the defendant's service; and, second, contributory negligence. The reply is a general denial.

The evidence showed the following facts: Plaintiff was thirty-four years old at the time of the accident, and for eight years prior thereto had been working as a lineman for the Western Union Telegraph Company, the Missouri Electric Light Company of St. Louis, and at different times for the defendant. He was perfectly familiar with the duties of a lineman and of the risks incident to that work. He knew how to test a pole or cross-arm before going upon it to ascertain whether it was rotten or sound, safe or dangerous. He knew that the life of a cross-arm or a pin in a cross-arm was from six months to six, or even ten, years; and that they are liable to dry rot, and that no one can tell how long one will last. He had worked on this same line and upon this same pole and cross-arm, and had put this same peg or pin in this same cross-arm, and strung a wire to it, during the summer immediately preceding the accident. He knew that the tests for ascertaining whether a cross-arm was sound or rotten were to strike it with a hand axe or with the pliers, or to dig into it with a screw driver, or to drive a screw into it. He admits he made no test whatever of the cross-arm. He says it was painted, and appeared to be all right, but because it was painted its condition could only be ascertained by applying one of the tests mentioned. The pole was owned by the city, and had only two cross-arms. The top one was short, and carried the electric light wires; the lower one was a 10-pin cross-arm, about 10 or 12 feet long, and was owned by the defendant. It was mortised and bolted into the pole, and projected about 5 or 6 feet on each side of the pole. It was made of pine, and was 3 3-4 inches in perpendicular dimensions, by 1 1-4 inches in width. The pins or pegs are made of oak or ash, and are set in holes bored through the cross-arm. The wire the defendant had on the pole was called the "police circuit." Several days before the accident the line was reported to be in bad working order, and the plaintiff and J. W. Gates, another experienced lineman, were sent out from the defendant's office, to run over the line, repair it, and fix it up so that it would give better service. The plaintiff and all linemen in the defendant's service,

and generally in all similar services, were required to supply themselves with the necessary tools to be used as linemen, which usually consisted of a pair of pliers, a screw driver, climbers, clamps, and a safety belt. The safety belt is worn by all linemen, and consisted of a belt or strap which went round the waist and the pole and fastened with "snaps," and was intended to prevent the lineman from falling while at work on the pole or cross-arm, and to enable him to work with both hands. It is from 3 to 6 feet long. Gates had all of the above-mentioned tools, including the safety belt. The plaintiff had all except a safety belt. The plaintiff and Gates started to repair and fix up the line. No foreman or superior officer went with them. They worked a day or two before the accident tightening wires, and doing whatever they found or deemed necessary to put the line in working order. Among other defects they found before they reached the pole and cross-arm in question were three or four cross-arms on other poles that were rotten and dangerous, and these they took out, and replaced them with new ones, which they got from the supply the defendant kept on hand for the purpose. They also tightened up the wires wherever they sagged, as they also did the electric wires wherever they sagged down upon the telephone wires and interfered with the latter wires. When they reached the pole where the accident happened, about 11 o'clock in the morning, the plaintiff climbed the pole first, and got above the lower cross-arm,—the defendant's,—on the north side of the pole, and Gates climbed up the south side of the pole, and stopped with his waist at the cross-arm. They found that the electric wire on the top cross-arm sagged down so as to come in contact with the telephone wire on the lower cross-arm. They worked about an hour tightening the wires, and during that time the plaintiff stood upon the defendant's cross-arm, but close up to the pole. Gates got out on his side of the cross-arm, and tied a wire, and the cross-arm bore his weight, but he was a lighter man than the plaintiff, who was over 5 feet 9 inches in height and weighed over 150 pounds. During the time they were at work, the peg or pin to which defendant's wire on the north side of the pole, where the plaintiff was working, broke, because of the strain of the wire upon it, which was greater because the wires ran from that pole at an angle. The plaintiff noticed the broken peg, and examined it, and found that it was rotten. When they had finished tightening the wires, the plaintiff unfastened the wire from the broken peg, and stepped out on the cross-arm about two feet from the pole for the purpose of tying the wire to the next peg further out on the cross-arm. When he did so, the cross-arm broke, he was thrown to the ground, and his leg broken. Afterwards it was discovered that the cross-arm was defective, having been affected with the dry rot. At the close of the plaintiff's case the defendant demurred to the evidence. The demurrer was sustained, and the plaintiff took a nonsuit, with leave, which the court afterwards set aside, and the defendant appealed.

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C. A. Mosman and Warner, Dean, McLeod & Holden, for appellant.

A. H. Harrison and John Geo. Parkinson, for respondent.

Opinion by MARSHALL, J.:

It is not denied in this case, for the law is too well settled to admit of discussion, that it is the duty of the master to furnish to the servant a reasonably safe place and reasonably safe appliances on which and with which to do the work required of the servant, and, conversely, it is equally well settled that it is the duty of the servant to take ordinary care to learn the dangers which are likely to beset him in the service. . . . He must not go blindly or heedlessly to his work, when there is danger. He must inform himself. . . . The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment—that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has therefore no right of action, in general, against his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know of it, it was part of his contract, and he cannot, in general, recover. *Price v. Railroad Co.*, 77 Mo. 508; *Thomas v. Railway Co.*, 109 Mo. 199, 18 S. W. 980; *Steinhauser v. Spraul*, 127 Mo. 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441. The servant, when he enters the employment of his master, assumes not only the risks incident to his employment, but all dangers which are apparent and obvious as a result thereof. The master is no insurer against all accidents that may overtake or befall the servant in his employ. *Nugent v. Milling Co.*, 131 Mo. 245, 33 S. W. 429. If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow servant in connection with which

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or with whom he is to labor is unsafe or unfit in any particular, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him. 2 Thomp. Neg. 1008. In *Steinhauser v. Spraul*, 127 Mo. loc. cit. 562, 28 S. W. 626, 27 L. R. A. 446, it was said:

"Again, no principle is more frequently enunciated or more often applied in the adjudicated cases than that which holds that an employee, in engaging in the service of another, assumes the risks incident to such employment; and this is especially true of seen dangers and patent defects. Where ordinary inspection and carefulness will enable the employee to avoid the danger, there he will be required to use such inspection and carefulness. 'But it is held that, wherever the employee's means of information are equal to or greater than those of his employer, the employer will not be liable in case of injury from a defect of that sort. But this is perhaps little more than to say that the servant, as well as the master, is bound to ordinary care. For patent dangers or defects, the master, as a rule, is not liable, and in many cases it has been held that they need not be pointed out, even to minor employees, if the latter be capable of discerning them.' Beach, Contrib. Neg., 2d ed., sec. 359."

In *Junior v. Power Co.*, 5 Am. Electrl. Cas. 369, 127 Mo. 79, 29 S. W. 988, it was said:

"The facts in this case bring it within the familiar principle that if a servant, capable of contracting for himself, and with full notice of the risk he may run, voluntarily undertakes a hazardous employment, or to place himself in a hazardous position, or to work with defective tools or appliances, the master is not liable for injury received from these known risks."

The case of *Flood v. Telegraph Co.*, 4 Am. Electrl. Cas. 402, 131 N. Y. 603, 30 N. E. 196, is peculiarly opposite to the case at bar in its essential features. In that case the New York Court of Appeals, speaking through Earl, C. J., said:

"The plaintiff seeks to enforce liability upon the defendant for the death of the intestate because of its negligence as to the cross-arm which broke under his weight. We have carefully read and weighed the evidence contained in this record, and are unable to find any showing of culpable negligence adequate to sustain this judgment. The defendant did not insure the

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safety of its employees. It was bound only to use reasonable and ordinary care to provide for them a safe place to do their work, and they assumed the ordinary risks of the employment in which they were engaged. The cross-arms on telegraph poles, manifestly from their usual size and strength, are not intended to bear the whole weight of any person; and yet the evidence shows that persons engaged in fixing them, and placing wires upon them, do sometimes rest their weight upon them. It must always be a hazardous venture for a man to sit on the outer end of one of these cross-arms, engaged in pounding near the end with a hammer. When the arm is new and perfect, this may be done with safety; but it must always be attended with great danger, and it is unnecessary, as the work can be done without resting the whole weight upon the arm. There was no negligence in furnishing and putting up this arm originally. It was of the material and of the size and apparent strength and safety then in use by all telegraph companies. And so far as appears, such arms have been found adequate for every purpose. For some time before the accident the defendant had been using larger and stronger arms to carry heavier wires, and only for that purpose. There was a system of inspection for the arms when purchased, and it does not appear that there was anything in the external appearance of this arm, when new, which indicated any defect or weakness, or that there was any defect therein discernible by any ordinary inspection. This arm had been in use for about six years, and during all that time had perfectly answered its purpose. There was no proof showing how long such an arm ought to last or be used. The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of telegraph poles and wires, and carefully looked at them, and tried the poles to see if they were still strong and adequate. They were provided with arms, so that, if they discovered any that were insufficient, they could replace them. They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary. The linemen all discharge their duties in the daytime. They have frequent occasion to climb the poles, and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and, if they find them insufficient, to replace them, or to report the fact. It is the obvious duty of every lineman, before going upon one of these arms many feet above the earth, to inspect it for his own safety."

The case of *Bergin v. Telephone Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192, is also very similar to the case at bar. In that case it was said:

"Delaney was an experienced lineman, acquainted with the duties and dangers of his employment. As against the telephone company, his negligent failure to perform one of the duties of his employment must defeat a recovery for an injury caused by such failure. The relation of Delaney to the

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electric railroad company was different. As he was not their employee, he was under no contract duty to test their wires or circuit breakers. Under different circumstances he might have assumed that the electric company was performing its duty, and using safe and suitable appliances to prevent the escape of electricity from the main or trolley wire to the guy wires. But when the accident happened he knew, as an experienced lineman, that such was not the fact, and that it was unsafe to act upon such a belief. He had been expressly warned of the danger of a contact with wires of this kind. Two instances upon this same work of damages caused by the escape of electricity to the telephone wires by reason of defective circuit breakers had been called to his attention; and a fellow workman, but a day or two before this accident, pointed out to him this particular guy wire as one from which he had himself just received a shock. With such knowledge, and after such warning, Delaney heedlessly pulled the wire which he was coiling from the arm of the telephone pole in such manner that it would obviously fall, as it did, upon the guy wire, and when, as the court finds, it would have been easy for him to have thrown the wire from the pole so as to avoid contact with the dangerous guy wire. The defendant electric railroad company can be only liable in this action for an injury caused by its negligence to one who was himself in the exercise of ordinary care. Its negligence did not excuse Delaney from exercising such care to avoid an injury. Applying that test to the conduct of Delaney, namely, the care which a person of ordinary prudence and judgment should have exercised under similar circumstances,—and we have no reason to think any different standard was applied,—the trial court has found that he was not in the exercise of due care alleged in the complaint, and that his negligence essentially contributed to cause his injury. This conclusion of the court is final.”

There is not a particle of evidence in this record to sustain the allegation of the petition that the work was being done under the direction of defendant's foreman, or of any superior officer. The plaintiff and Gates were alone, and were sent to repair the line and fix it up. They were left free to adopt what measures they saw fit to accomplish the purpose. Neither is there any evidence to support the contention of the plaintiff that his duties as a lineman did not require him to examine or inspect the cross-arms to see if they were safe before he rested his weight on them. On the contrary, whether such duties ordinarily attach to the business of a lineman or not, the plaintiff, in the performance of the work of repairing and fixing up the line, was expected to and did inspect and repair the whole line,—the poles, cross-arms, and pins, as well as the wires,—and his testimony shows that he so

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understood it; for he says that he and Gates had discovered three or four cross-arms that were rotten or dangerous, and had taken them out and replaced them with new cross-arms, which they obtained from the stock the defendant kept on hand for that purpose. The plaintiff therefore was not only acting as a lineman, but was also an inspector as to this work. He was engaged in the work of repairing the line. It was his duty to look for defects, and to remedy them. He had no right to assume that the defendant had previously and properly inspected the line, for, if it had, it would have known of the defects, and have directed the plaintiff and Gates what defects existed, and what they should repair. This case is clearly distinguishable from the cases cited and relied on by the plaintiff, in this: That in those cases the servant injured was not charged with the duty of ascertaining and repairing the defects in the appliances, but was using appliances furnished him by the master for use in the ordinary course of his employment, while in this case the plaintiff was charged with the duty and engaged in the work of inspecting and repairing the master's appliances. The plaintiff, therefore, assumed by his contract of employment, all the risks incident to the performances of the work upon which he was engaged. The accident was caused by one of those risks. The plaintiff therefore has no claim against the defendant.

In addition, the plaintiff was a skilled lineman of over eight years' experience. He knew that cross-arms rot in from six months to ten years, and that no man can foretell how long any particular cross-arm will last. He knew all the tests — which were very simple — for ascertaining whether a cross-arm was sound and safe or not. Yet he did not apply a single test to this cross-arm before putting his weight upon it. He knew it was painted, and that any defect in it could not be discovered by the eye, but could only be ascertained by one of the usual tests. Yet he did nothing to find out its condition before he went out on it. He knew that all linemen wear a safety belt, which they furnish themselves, and which the company did not furnish, and yet he had none, and used none. He knew the purpose of a safety belt was partly to prevent a fall

if the cross-arm broke, and yet he used none. He seeks to excuse this neglect of his own safety by saying he could not have used it when he went out on the cross-arm. But he is manifestly mistaken in this regard, for he says the safety belt was five feet long, and he only went out two feet on the cross-arm. He was put to notice of the condition of the cross-arm before he went out on it, for he saw that the pin, which was made of oak or ash,—a hard wood,—was broken and rotten; and he knew that if the pin was rotten the probability was that the cross-arm, which was made of pine, a soft wood, was also rotten. Yet he took absolutely no precautions for his own safety. His knowledge and means of knowing the condition of the cross-arm was not only equal, but superior, to the knowledge and means of knowledge of its condition by the master. He was on the spot; the master was in town in the office. Upon this showing it was plain that the risk was assumed by the plaintiff, and also beyond dispute that the plaintiff's own negligence contributed directly to the happening of the injury, and that he is not entitled to a judgment against the defendant. Ordinarily, the question of contributory negligence is one for the jury, but where the plaintiff's own case clearly establishes contributory negligence there is no disputed fact for the jury to pass upon, and the matter is one of law. *Hudson v. Railway Co.*, 101 Mo. 13, 14 S. W. 15; *Milburn v. Railroad Co.*, 86 Mo. 104; *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. 66; *Stone v. Hunt*, 94 Mo. 475, 7 S. W. 431; *Buesching v. Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Evans & Howard Fire Brick Co. v. St. Louis & S. F. Ry. Co.*, 21 Mo. App. 648; *Warmington v. Railway Co.*, 46 Mo. App. 159.

In *Haven v. Railroad Co.*, 155 Mo. 216, 55 S. W. 1035, it was held that this court will not reverse the ruling of a trial court in granting one new trial unless no verdict in favor of the party at whose instance the new trial was granted could be allowed to stand. *Haven v. Railroad Co.*, 155 Mo., loc. cit. 229, 55 S. W. 1035. This case falls within the exception to the rule stated.

For those reasons the judgment of the Circuit Court setting aside the nonsuit is reversed, and the cause remanded to that court,

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with directions to overrule the motion to set aside the nonsuit. All concur.

Assumption of risk of defective cross-arms.—In the case of *Flood v. W. U. Tel. Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603, 38 N. E. 196, a lineman, who had been in the employment of a telegraph company for many years, as lineman and as inspector, and was familiar with all the appliances pertaining to the maintenance of a telegraph line, was killed by being thrown to the ground from a telegraph pole, caused by the breaking of a cross-arm, when he had placed his whole weight upon it; the company was not shown negligent in either the maintenance or erection of the arm. It was held that no cause of action arose to the personal representative of the lineman by reason of his death thus caused; a lineman assumes the known and ordinary risks of his employment, and is bound to know that the cross-arm of a telegraph pole is not intended to bear a man's weight. See, also, *N. Y. & N. J. Telephone Co. v. Speicher*, 59 N. J. L. 23, 39 Atl. 661. In the case of *McDonald v. Postal Telegraph Cable Co.*, 22 R. I. 131, 46 Atl. 409, a lineman in the employ of the defendant was injured by the breaking of a cross-arm upon which he was working; it appeared that there was a knot in the cross-arm, which was obvious upon proper inspection, but being partly covered with paint and by an insulator, was not necessarily discernible by one whose only duty as an employee was not that of inspection; it was held that the questions of negligence and contributory negligence were properly submitted to the jury; also, that an instruction to the jury that the defendant was bound to furnish a reasonably safe cross-arm was not equivalent to saying that it insured the safety of the appliance; also that it was proper to refuse the following requests to charge: (1) That the defendant was not liable if it furnished a sufficient number of cross-arms from which workmen could select; (2) if it employed competent workmen to inspect cross-arms; (3) that if the defect was visible, the plaintiff was negligent and could not recover.

In the case of *Clarain v. W. U. Tel. Co.*, 2 Am. Electl. Cas. 344, 40 La. Ann. 178, 30 So. 625, the plaintiff was employed by the defendant as a lineman and was injured by the breaking of a wire which he was attempting to affix to a cross-arm, and by the simultaneous breaking of the cross-arm upon which he was working. The court held that the company was liable for its failure to furnish safe appliances. The court said: "It must be considered that the employment was a dangerous one; not dangerous in merely climbing or ascending the poles and reaching out to the end of the cross-arms and fastening the wires, but dangerous from the fact that the wire and its wooden support might chance to be defective or unsound. These, necessary for his work, the employee had a right to presume were entirely safe; and he was entitled to rest on this presumption for his security."

ORR V. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

North Carolina; Supreme Court.

1. INJURY TO EMPLOYEE BY FALL OF TELEPHONE POLE; USE OF PROPER TOOLS.—
The plaintiff was an employee of the defendant telephone company and was engaged in taking down a telephone pole. The telephone pole fell and injured the plaintiff because, as it was alleged, of a failure of the defendant to furnish proper pikes and "dead men" so called; such implements were at a distance of several miles from the place where the work was being performed. It was contended by the defendant that it was the duty of the plaintiff to have taken such implements with him. The persons employed in the work were under the supervision of a foreman. It was held that the failure of the plaintiff to provide for himself such implements was not negligence on his part, but that it was the duty of the defendant's foreman to see that the plaintiff and the other employees working with him were equipped with all necessary tools.

Appeal by plaintiff from a judgment of nonsuit. Decided June 10, 1902; reported 130 N. C. 627, 41 S. E. 880.

Jones & Tillett, for appellant.

Maxwell & Keerans, for appellees.

Opinion by FURCHES, C. J.:

This action is brought to recover damages for injuries received in taking down a telephone pole, caused by the negligence of the defendant. The evidence discloses the fact that one Wood was the superintendent of the defendant in charge of this work; that on the morning the plaintiff was injured he came up town to work on another job, and Mr. Wood told him: "You can drop off from your work. I want you to go out with Purtle on the long-distance telephone line." The tools and appliances necessary for such work were in the tool house of the defendant, locked up, and Wood had the key. He unlocked the door, and told the hands to put the tools in the wagon, and plaintiff put some of them in the wagon. He then went downstairs after some tie wire, and while down there "they" called, "Come on, we are ready," and he hurried down, got his "dinner bucket," got in the wagon and off they went to

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where the work was to be done, a distance of about six miles. There were five of them, and they were to work under Mr. Purtle, and when they got to the place where the work was to be done Purtle put them to work, some to digging up the old poles, and some to digging holes for the new poles. When they got the old poles ready to come down, Purtle said, "Come on, boys, and take it down." This they undertook to do, but found they had neither pikes nor "dead men" to do it with, and they undertook to take them down by hand, and by using shovels in place of pikes. "Dead men" and pikes are the usual implements used in doing such work, and plaintiff contends that, if they had had pikes and "dead men," the pole would not have fallen, and he would not have been hurt. The plaintiff contends that Wood had the right to hire and discharge, and though he thought it was dangerous to take down these poles without pikes and "dead men," he feared that if he did not obey the orders of Purtle he would be discharged by Wood. The defendant undertakes to defend itself against the charge of negligence in not furnishing the necessary tools and appliances upon the ground that such tools and appliances were in the tool house, and that it was the duty of the plaintiff to have gotten them; that he and the other hands were told to go to the tool house and get the tools. This does not seem to us to be a satisfactory answer. Purtle was there, and he was the "boss," and it seems to us it would have been rather officious in the plaintiff, who had just been hired that morning for a day's work, to have undertaken to supersede Purtle and boss the job. We do not lay any stress upon the contention that plaintiff was afraid he would be turned off, and lose his job, if he did not obey Purtle. This doctrine has been carried to a very great extent, but it has never been carried to the extent of applying it to a hand employed for one day, so far as we are aware, and we do not propose to carry it to that extent in this case. But we do think it was the duty of the defendant to furnish the plaintiff with proper tools and appliances with which to do this dangerous work, and that it was not the duty of the plaintiff to furnish them. There was error in dismissing the action as upon nonsuit.

New trial.

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Use of tools and appliances by employee.—In the case of *Anderson v. Inland T. & T. Co.*, 7 Am. Electl. Cas. 725, 19 Wash. 575, 55 Pac. 657, 41 L. R. A. 419, the plaintiff, a lineman in the employ of the defendants, while engaged at work upon a pole of the defendant, came in contact with the span wire belonging to an electric street railway company and received therefrom an electric shock, which caused him to fall to the ground, seriously injuring him. It appeared that there was no regular inspector employed by the telephone company, and that it was the duty of the linemen themselves to inspect the wires. It was the custom to furnish the linemen with apparatus by which they could test insulators and determine whether or not they were in a safe condition. It appeared in this case that the plaintiff made no use of such apparatus nor did he in any way attempt to test or inspect the safety of the wires before working upon them. It was held under such circumstances that the plaintiff was not free from contributory negligence and that no recovery could be had of the company. The rule is as illustrated by this case and others, that where, "an employee is provided with implements or apparatus, by the use of which he may be able to avoid injury to himself, a failure on his part to use such implements or apparatus will prevent recovery for any injury received by him, which might have been averted by the use thereof." Joyce on Electric Law, sec. 668; see, also, *Bergin v. Southern New England Telephone Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; *Huber v. La Crosse City Ry. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583.

DUPREE V. TAMBORILLA.

Texas; Court of Civil Appeals.

1. **INJURY TO ELECTRIC LIGHT TRIMMER BY BREAKING OF IRON RODS; NEGLIGENCE.**—The plaintiff while in the employ of the defendant, the receiver of an electric light company, was injured by a fall from an electric light pole, caused by the breaking of the metal rods supporting the electric lamp on the top of a pole. Such rods were hollow iron tubes, although there was nothing to indicate but that they were made of solid iron. An examination of them after the fall disclosed the fact that they were badly eaten with rust. Had the rods been solid, as they appeared to be, they would not have broken, and the accident would not have occurred. The defendant had never had these rods inspected. It was not the duty of the plaintiff to ascertain the condition of the rods by inspection. It was held that the defendant was guilty of negligence.
2. **DUTY OF LIGHT TRIMMER TO INSPECT.**—Although it is made the duty of an electric light trimmer to report defects or disorders observed by him and to enter the same in what is termed the "trouble book," he is not thereby

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made an inspector of appliances; and without special instruction to look for defects not observable without the application of some test, and not being furnished with tools or appliances with which to test the soundness of electric light poles and their appliances, he will not be held responsible for a failure to discover the defect in the rods causing his injuries.

3. **ADMISSIBILITY OF EVIDENCE AS TO METHOD OF ASCENDING POLES.**—Where the defendant introduced testimony as to the manner in which linemen had customarily ascended the poles, and where it appears that the plaintiff had acquired most of his experience as an employee of the electric light company before becoming an employee of the receiver, and it does not appear that the construction of the poles and lamps had been changed by the receiver, or that the method of ascending the poles had been altered either by order of the receiver or by custom, it is not error to permit a witness to testify in behalf of the plaintiff as to his manner of climbing such poles a number of years before the accident while in the employ of the company of which the defendant is receiver.

Error brought by defendant from judgment for plaintiff. Decided January 17, 1902; reported 27 Tex. Civ. App. 603, 66 S. W. 595.

Hutcheson, Campbell & Hutcheson, for plaintiff in error.

W. C. Oliver and Jas. B. & Chas. J. Stubbs, for defendant in error.

Opinion by GILL, J.:

Joseph Tamborilla brought this suit against Blake Dupree, the receiver of the Citizens' Electric Light & Power Company of Houston, Tex., to recover damages for personal injuries sustained by plaintiff by a fall from one of the electric light poles in charge of defendant, while the plaintiff was engaged thereon, as an employee of defendant, in the discharge of his duties. The negligence averred against defendant consisted in permitting the metal rods which supported the electric lamp on top of the pole, from which plaintiff is alleged to have fallen, to become weak and insufficient, so that, when plaintiff took hold of them in the discharge of his duties, they broke and caused him to fall. The defendant pleaded general denial, assumed risk, and contributory negligence. The cause was tried before the judge without a jury, and resulted

in a judgment for plaintiff for \$5,000. The receiver has, by writ of error, brought the cause here for revision.

The plaintiff, who was in the employ of the electric light company as "trimmer" when the concern was placed in the hands of the receiver, continued his duties as an employee of the receiver, and was so engaged when the injuries complained of were sustained. The Citizens' Electric Light & Power Company was engaged in furnishing light to the city of Houston and its inhabitants by means of electric lamps, some of which were placed on the tops of tall poles, as hereinafter described, and the receiver had continued the business. The duties of plaintiff as trimmer were to make daily visits to the electric lamps in the district assigned to him, to insert new carbons, and to see that the lamps were properly adjusted for the night. In order to reach such lamps as were supported on the tops of poles, it was necessary that he should climb to the top of the poles by means of iron pins driven in the sides of the poles, about 18 inches apart. These pins constituted steps upon which the climber placed his feet in ascending; the last step being placed a short distance from the top of the pole, and the whole forming a sort of ladder designed for the use of trimmers and others whose duties might require them to ascend. Across the extreme top of this pole was fitted an iron casting, the two arms of which extended at right angles from the pole, and in which were fastened the iron rods or tubes which supported the lamp and its hood. The rods or tubes were two in number, one running up from each arm of the casting. Their height above the casting was about 38 inches. On their top was placed the hood of the lamp, and between them was hung the lamp itself. The combined weight of the hood and lamp was about 45 pounds. The rods or tubes were 3-4 inch iron gas pipe, and, from their appearance alone, it did not appear whether they were solid iron rods or hollow tubes. Plaintiff thought they were solid rods, and could not have ascertained that they were otherwise by the exercise of ordinary care in the discharge of his duties as trimmer. While the evidence is conflicting as to whether these tubes were designed to be used by the trimmer in reaching and sustaining the position necessary for the

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proper trimming and adjustment of the lamp, the evidence is sufficient to support the conclusion reached by the trial court that this was one of their ordinary and proper uses. At the time of the accident, plaintiff had been discharging his duties as trimmer for more than a year, and had daily climbed the pole from which he ultimately fell and was injured. He testified that he had each time used the rods in practically the same way. On the occasion in question he climbed to the top of the pole, placed one foot on the last metal step, and, taking hold of the rods or tubes, raised himself to an upright position, so that his body was opposite the lamp, reached one arm around the supporting rods, while he held the other with his opposite hand, and while doing so both rods snapped off near their connection with the casting, and he fell to the ground and was injured as alleged. The poles appear to be about 30 feet in height. The tubes in question had been in use for several years, and the evidence shows that they are rapidly weakened by rust in the damp climate of Houston. An examination of these rods immediately after the fall disclosed the fact that they were badly eaten with rust; they being eaten entirely through in some places, and the entire rod being reduced to the thickness of tin after the rust was knocked off. The rust adhered to the rods while they were in position, and their condition was not disclosed to casual observation. Had the rods been solid, as they appeared to be, they would not have broken; and, had they been sound tubes, the accident would not have occurred. The receiver had never had these rods inspected, and was guilty of negligence in failing to ascertain their condition and renew them before they reached the dangerous condition in which they were found. The plaintiff was not an inspector, and was not guilty of negligence in failing to ascertain the condition of the rods, nor in the method he used in reaching the position necessary to enable him to perform his task.

All the assignments of error, save one, assail the sufficiency of the evidence to support the judgment. Defendant contends that the evidence shows that the metal rods were designed alone to support the weight of the lamp and hood, were sufficiently strong for that purpose at the date of the accident, were never intended to be

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used as a means of climbing to the necessary position or of sustaining any part of the weight of the climber, and that plaintiff was guilty of contributory negligence and assumed the attendant risk in so using them. It should be borne in mind that the lamp was at a considerable and dangerous height from the ground; that the trimming of the lamp required the use of both hands. The position necessarily assumed in performing this task placed practically the entire body higher than the top of the pole and the metal casting or cross-arm, thus leaving nothing by which the operator could steady or support himself, save the rod supporting the lamp and hood. The consensus of the testimony shows that even the most careful and prudent and experienced trimmers, and those who knew the rods were not solid iron, placed some weight on these upright supports while adjusting the carbons; and this is true in the very nature of things. The defendant must have known from the character of the structure that the rods would be used by trimmers in reaching and maintaining their perilous position. The weight of the pendent lamp and hood was about 45 pounds, and plaintiff ought not to be held to the unreasonable presumption that the rods had barely sufficient strength to support the lamp and hood, and no excess of strength to answer the uses which their appearance invited. He was never told not to use them. Never advised that they were not solid, and their size (which was greater than the metal foot rests) and their apparent solidity, instead of warning him not to use them, invited him to rely on them in gaining and maintaining a position where some support other than his feet and knees was so obviously necessary. But defendant contends that, even if it be conceded it was proper to use them to steady the body, plaintiff was negligent in using them to pull up or raise his weight by, and that in so doing, and in standing on the top step, instead of the step next to the top he voluntarily and recklessly did an unnecessary and improper thing, which alone caused his injury. According to plaintiff's testimony, they did not break while he was raising himself to the proper position, but when he put his arm around to reach the lamp. Plaintiff did not place his entire weight on the rods, but expressly stated that nearly

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all his weight was on his foot which he had placed on the step. He and the witness Riley stated this to be the usual and proper way. Other witnesses, while claiming that the safer way is to stand on the next to the last step, and put the leg through and over the crotch of the casting, admit that it is an awkward thing to do; and nearly all the witnesses concede that the trimmer is left to his own judgment as to the safest and best way, and that they do not all use the same method. They all concede that the use of both hands is necessary in adjusting the carbon, and that, even when standing on the last step but one, with one leg through the crotch, or thrown around the post over the top step, as shown in one of the protographs, the body is utterly without lateral support, unless the rods are used for the purpose. As to the safest and best way to do the work, there is a substantial conflict in the evidence; but, even if this were not true, the plaintiff is not held to the adoption of the safest method. He is held only to the exercise of ordinary care for his safety in the light of the facts which he knew, or must be held to have known. It seems to us that no reasonable man would expect that what appeared to be solid iron rods, three-fourths of an inch in diameter, would snap off like brittle wood, without a warning bend, or time to catch a more substantial support. His daily position on the pole was one of peril, at best; and he had the right to presume, in the absence of knowledge to the contrary, that his master had made and maintained the supports on which he might rely for safety in a reasonably safe condition. It will not do to say he evidently put more weight on the rods than he usually did. In doing his work, which it was his duty to do with reasonable dispatch, the law did not require that he should, at his peril, measure to a fraction the amount of weight he might with safety impose upon the rods. It was the master's duty to construct against the use to which he might reasonably expect they would be subjected. On the whole case, we think it fairly appears, as found by the trial court, that the act of plaintiff in using the rods as he did was reasonable and natural, and such as the master, in the light of all the circumstances, ought to have foreseen and provided against. Whether,

under any circumstances, it was proper for the trimmer to use the top step as plaintiff did, has been determined by the trial court, on competent evidence, adversely to the contention of defendant, and we do not feel authorized to disturb the finding.

It is further contended by defendant that plaintiff was an inspector,—so made by the receiver,—and that this is shown by the undisputed evidence. It true, plaintiff's duties required him to ascend the pole daily, and he was required to report by entries in what was termed the "Trouble Book" any defect or disorder he saw on the lines; but it also appears that he was not instructed to look for defects not observable without the application of some test, and he was furnished no tools or appliances with which to test the soundness of the poles, or the extent to which rust had damaged the iron rods. He reported from time to time such defects as he saw, but the evidence is sufficient to support the conclusion that he was in no sense made an inspector of the appliances, the defects in which caused the accident. Nor can he be held, under the facts, to have known that the receiver had not adopted some system of inspection whereby he could have been advised from time to time of the condition of the various fixtures on which the safety of the employees depended. We do not deem it necessary to discuss and distinguish from this case the authorities cited on this point by appellant. We think, under a fair construction, they are inapplicable to this case. The principles of law which control the case are familiar and well settled, and it would serve no useful purpose to discuss them, or to cite authority in their support.

By the seventh assignment of error, defendant complains of the action of the court in permitting the witness Ballinger to testify as to his manner of climbing the poles in 1894 and 1895, while in the employ of the company of which the defendant is receiver. The objection was not overruled when made, but, as the trial was before the court, it was admitted subject to objection. If error, it was not harmful, and the assignment might be overruled upon this ground. But in hearing this evidence the court did no more than hear the witness Ballinger testify to matters about which others had been

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permitted to testify without objection, and to which defendant had addressed much testimony; that is, the manner in which various linemen had ascended the poles. It was shown that plaintiff himself had acquired most of his experience as an employee of the light company before becoming an employee of the receiver, and it does not appear that the construction of the poles and lamps had been changed by the receiver, or that the method of ascending the poles had been altered either by order of the receiver or by custom. The main force of the objection goes rather to the weight than to the admissibility of the evidence. The case is plainly one of fact, and we are clear that it is not such as would authorize us to interfere on the ground that the evidence is insufficient, or that the judgment is manifestly against the truth of the case.

Much of defendant's brief is addressed to matters affecting the weight of the evidence and the credibility of various witnesses,—plaintiff among the number. We have not deemed it necessary to follow the brief and discuss at length the force of the testimony. We have thought it sufficient to state our conclusions with such elaboration and explanation as are necessary to a clear understanding of the nature of the case.

The judgment is affirmed. Affirmed.

Injury to electric lamp trimmer by wagon catching in electric wires.—In the case of *Campbell v. Wood*, 22 N. Y. App. Div. 599, 48 N. Y. Supp. 46, a lamp trimmer employed by an electric light company, brought an action to recover damages for personal injuries resulting from the alleged negligence of the driver for an express company; it appeared that, after the lamp trimmer had lowered an electric lamp in order to clean it, so that the wires connected with it were only about six feet above a public street, he saw, while standing in the street, three wagons approaching him in a single file; that he told the drivers when at a distance of about fifty feet to look out for the wires, and then turned to his lamp again; that two of the drivers did as directed, but that the top of the third wagon, an express wagon, whose driver did not hear the warning, caught the wire, dragged the plaintiff, whose hand became entangled under the lamp globe, against the wagon, while the horse proceeded at a rapid rate, until the wire broke. It was held that no negligence was shown upon the part of the driver of the express wagon; and that the plaintiff was shown to have been guilty of contributory negligence.

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Vermont; Supreme Court.

1. **INJURY TO LINEMAN BY FALL OF POLE; DUTY OF INSPECTION; ASSUMPTION OF RISK.**—The plaintiff was injured by the fall of an electric light pole upon which he was at work. The pole was badly decayed, although there was nothing in its appearance to indicate that it was unsafe. Its condition could have been ascertained by digging a few inches below the surface of the ground. No inspection of the pole was made by the plaintiff. Under such facts the defendant was not guilty of negligence. The plaintiff himself was guilty of negligence in failing to ascertain the condition of the pole before climbing it. In ascending a pole without proper inspection a lineman assumes the risk of danger. The fact that the defendant might have had knowledge of its unsafe condition would not relieve the plaintiff of his duty of inspection.

Exceptions by defendant from judgment for plaintiff. Decided January 28, 1901; reported 73 Vt. 35, 50 Atl. 554.

John W. Gordon and Richard A. Hoar, for plaintiff.

Senter & Goddard and H. A. Huse, for defendant.

Opinion by **MUNSON, J.:**

The plaintiff was injured by the fall of an electric light pole, at the top of which he was working. There was nothing in the appearance of the pole as it stood to indicate that it was unsafe. Its decayed condition could easily have been ascertained by digging a few inches below the surface. The plaintiff had been at work for the defendant but a few weeks, and knew nothing of the history of this pole. It was being stripped by direction of the superintendent of the line. The company had decided upon a change of plan which rendered the maintenance of a pole at that point unnecessary, and the plaintiff understood that the pole was to be taken down for that reason. The company had before this decided to reset it that fall because of its unsound condition. This fact was not communicated to the plaintiff nor to the person with whom he was working. The plaintiff had had some previous experience as a

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lineman, and entered the defendant's service with an understanding that climbing was to be a part of his work. He knew that poles became decayed below the surface after a time, that of poles of the same variety some became decayed sooner than others, and that some test was necessary to ascertain this condition. He made no examination of the pole which caused his injury. The pole in question was one of two which stood on opposite sides of the street supporting the span wire from which the light was suspended. There was one guy wire running from near the top of the pole, in a direction opposite to that of the span wire, to a house, where it was fastened to a stone wall. The plaintiff had just detached and lowered the end of the span wire, and was changing his position to cut the guy wire, when the pole fell. The pole, as set in the ground, if it had been sound, would have held the plaintiff regardless of the wires. The connection of this pole with the other could have been broken as well by going up the other pole and detaching the span wire at the end. There were so many wires attached to that pole that it could not have fallen. Nothing appears as to a safer method of disposing of the guy wire than may be inferred from the facts regarding its fastening as above stated. It appears that some poles in a line will begin to decay by the second year; that two or three years later they should be examined to ascertain their condition; that some will be found to require resetting or extra guying within a short time after; that defendant's line was set in 1888, and that the work of resetting it was commenced in 1894; that, owing to the impracticability of doing this work in the winter, it is the practice to reset in the fall all poles not considered safe to remain until another season; that this was one of the original poles, and that a few months before the accident the superintendent examined it, and found it somewhat decayed, and that later it was designated as one of the poles to be reset that fall, as before stated.

The plaintiff testified that he was employed for the company by one Snow; that he worked with Snow and under his direction and never received instructions from any one else; that he was working under Snow's immediate direction at the time of the accident, and

that Snow told him to climb the pole. The case does not show what plaintiff's counsel claimed from this in argument or by way of request. Defendant's counsel requested an instruction upon the doctrine of fellow servant, but the court made no reference to the subject in its charge, and the defendant now claims that the omission was error. The claim is not sustainable. It cannot be said to appear from the case as presented that the plaintiff stood upon any ground that entitled the defendant to a compliance with its request.

The defendant moved that a verdict be directed in its favor, claiming that the uncontradicted testimony of the plaintiff and all the evidence in the case showed that the defendant was not guilty of negligence, but that there was negligence on the part of the plaintiff, and basing the motion upon grounds which raise the question whether the duty of inspecting the pole rested upon the defendant or the plaintiff. The plaintiff assumes that it was the duty of the defendant to ascertain the condition of the pole before requiring him to climb it, and that when he was put to work upon it without caution he had a right to assume that it was safe. The defendant contends that the inspection of the pole was a part of the plaintiff's duty as a lineman, and that, if he saw fit to climb it without an examination, he took the entire risk. It is impossible to say that it is the duty of the company to furnish the lineman a safe pole upon which to work. The nature of his employment involves the necessity of working upon poles in various stages of decay. He contracts with reference to this necessity, and must be held to assume the risks involved in it. The point of danger is a few inches below the surface, and the condition of the pole can be ascertained only by an examination at that point. The examination is not to determine whether the designated work shall proceed or not, but to determine in what manner it shall proceed. It is auxiliary to the lineman's principal work, can be conveniently made in connection with it, and requires no separate training. It is difficult to conceive of any preliminary work that would be more clearly in the line of the servant's duty. It could hardly be required that a company sending out a gang of men to repair its line should send other men before them to inspect the poles, and deter-

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mine which could safely be climbed without the taking of precautions. *McIsaac v. Lighting Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244. But it is said that the defendant had condemned this pole for an ascertained unsoundness, and that its failure to communicate this fact will enable the plaintiff to recover. We see no ground upon which this view can be sustained. In fact, the knowledge and action of the defendant were not such as the argument assumes. The company had condemned the pole as unfit to remain beyond that season, but not as unfit to use through the season, nor as unsafe to climb at the time plaintiff was sent to strip it. The company's standard of condemnation was with reference to a variety of considerations which might require the condemnation of poles entirely safe for climbing. We have not the means of determining just what that standard was, nor how nearly it coincided with the standard of safety as regards the handling of the pole. The ascertainment that the pole was "somewhat decayed," a few months before the climbing, did not charge the defendant with knowledge of the lineman's danger. The decay would be of uncertain progress, and the fact of its existence pointed only to the necessity of certain precautions which it was the lineman's duty to take irrespective of any warning. The actual condition of the pole at the time and for the purpose of the lineman's work remained an open question, to be determined by the usual inspection. This preliminary examination affords the basis for an exercise of the lineman's judgment. There are various methods and appliances by means of which a pole is stripped and lowered, and the lineman selects from these according as he judges the need to be. The defendant's silence gave the plaintiff no right to assume that the pole was safe for climbing, but, on the other hand, the defendant had a right to assume that in the absence of information, the plaintiff would take the usual precautions. Upon this holding there was no evidence of negligence on the part of the defendant, and a verdict should have been directed in its favor.

[Omitting portions of opinion relative to evidence as to employment of physicians and nurses.]

Judgment reversed, and cause remanded.

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See *Kellog v. Denver Consolidated Tramway Co.*, ante, p. 749, and extended note to the case of *Tanner v. New York, N. H. & H. R. Co.*, ante, p. 766.

Injury by fall of decayed pole; duty of inspection.—The case of *Western Union Telegraph Co. v. Tracy*, 114 Fed. 282, was an action by a lineman against the telegraph company to recover for an injury sustained by reason of the breaking of a pole upon which he was working, which was decayed below the surface of the ground; the evidence was conflicting as to whether under the custom and practice of doing such work it was the duty of the lineman to determine for himself the safety of the poles, or whether it was the practice and business of the foreman to inspect the poles to determine their safety and that the lineman relied on the foreman's inspection. The court submitted this question of fact to the jury, and upon a verdict in favor of the plaintiff it was held that it must be accepted as established that the plaintiff was not under the alleged duty, and also that he was not guilty of any contributory negligence and was free from fault. The Circuit Court of Appeals sustained the holding of the district court, and, in so doing, said:

"That the case was not one which the court would have been warranted in taking from the jury, unless upon the ground either that inspection of the pole was not a part of the foreman's duty, or (if it was) that the defendant was not responsible for the foreman's failure to discharge that duty, is too clear for argument, and that these subjects were dealt with in a manner as favorable to the defendant as was at all possible we are entirely satisfied. It is not necessary to decide whether, by reason of the company's legal obligation to exercise ordinary care to provide a reasonably safe place and appliances for its employees, it was not unconditionally bound to look to the safety of the pole upon which the plaintiff was required to work; for it was not ruled that the defendant's responsibility was conclusively fixed by this general rule of law, but that it depended upon whether, as matter of fact, the custom in doing such work was for the foreman to inspect the poles, or for the linemen themselves to inspect them. Upon this question the testimony was conflicting, and it was submitted to the jury with the statement that 'if, according to the custom and practice in this kind of work, the duty of inspecting the poles is upon the lineman, and not upon the foreman, it would follow that the company here would not be responsible for this disaster.' In our opinion, the court, in thus holding that the company was but provisionally responsible, and in leaving it to the jury to find whether the practice was such as to make it absolutely so, went quite as far as could be justified in restriction of the defendant's liability."

Upon the remaining point the law is well settled. The duty of inspection, if not that of the linemen,— and the jury has found that it was not,—was the positive duty of the company itself, and it was responsible for its non-performance, notwithstanding the fact that it had engaged another, however competent, to perform it. *Hugh v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994."

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BRADY V. WESTERN UNION TELEGRAPH CO.

United States; Circuit Court of Appeals, Sixth Circuit.

1. INJURY TO LINEMAN BY BEING STRUCK WITH TIE WIRE; INCOMPETENCY OF FELLOW SERVANT.—The plaintiff was a lineman in the employ of the defendant and while engaged in fastening telegraph wires to glass insulators on a telegraph pole by means of a tie wire the telegraph wire was drawn tight by one of the plaintiff's fellow servants and the tie wire broke loose and struck the plaintiff in the eye. It was contended and attempted to be proved that the fellow servant was incompetent, and that his incompetency was known to the defendant. It was held, in the absence of positive proof as to whether it was the act of the alleged incompetent servant which caused the injury, that the plaintiff could not recover.

In error to the Circuit Court of the United States for the Eastern District of Michigan. Decided February 10, 1902; reported 113 Fed. 909.

Statement by WANTY, District Judge:

The evidence in this case showed that the plaintiff was in the employ of the defendant as one of four linemen, whose business it was to carry the wire from the ground and fasten it by means of a tie wire to the glass insulators on the poles at a height of from 30 to 35 feet. It was shown that when the main wire was in position it was the duty of an employee, called a "jackman," to tighten it on receiving the proper signal from the linemen when they were ready. The manner of giving this signal was for the lineman farthest from the jackman to signal the lineman nearest to himself, who in turn passed the signal, when he was ready, to the second lineman, who, when he was prepared, signaled the lineman nearest to the jackman, from whom the jackman received the signal, which indicated that all of the linemen were ready to have the wire tightened, and upon that signal he tightened it. The evidence tended to show that the jackman was an unfit man for his position on account of having been addicted to the excessive use of intoxicating liquors for many years, and on account of his carelessness in tightening the wires on a number of occasions preceding the accident without signals from the linemen on the poles; and that the foreman, who had authority to hire and discharge the jackman, knew of his incompetency. The plaintiff on the morning of January 25, 1899, was tying the wire on the second pole from the jackman, and before he was ready, and before he had given any signal, and while reaching for his wrench, the wire was tightened, throwing into his face the tie wire, one end of which struck his eye and put

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it out, to recover damages for which injury this action was begun. On the conclusion of the plaintiff's evidence the trial judge directed a verdict for the defendant, and to review the judgment on that verdict the case is brought here on writ of error.

Edward McNamara (Harrison Geer and David E. Heineman, of counsel), for plaintiff in error.

C. A. Kent, for defendant in error.

Opinion by WANTY, District Judge:

It is settled law in the Federal courts that the master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and that he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employee; and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness, so that an incompetent person may not continue in the service to endanger the lives and limbs of his fellow servants. *Railroad Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634, and the large number of cases cited in that opinion by Judge Taft. The evidence in this case, however, does not show that the negligence of this jackman caused the injury. The plaintiff testified that he had given no signal before the wire was pulled by the jackman. But it appears that the jackman should receive the signal from the lineman nearest to him, who occupied the pole between the plaintiff and the jackman. There is no evidence showing that the lineman next to the jackman had not transmitted the signal, although the evidence is clear that he had not received the signal from the plaintiff. It is possible that the jackman did not receive this signal, but it was necessary to show that he did not before the plaintiff could recover. If he did receive the signal, it was his duty to tighten the wire, as he did, and the defendant could not be charged with negligence. It is not sufficient to show that an accident has occurred, and that it may have been caused by the negligence of an incompetent servant, for whose employment and retention in his service the master is liable, but the fact must

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be shown. In this case the court would not have been justified in allowing the jury to infer the absence of a signal when it could have been shown by positive proof if the signal had not been given. In *Patton v. Railway Co.*, 179 U. S. 658-663, 21 Sup. Ct. 275, 277, 45 L. Ed. 361, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. . . . It is not sufficient for the employee to show that the employer may have been guilty of negligence,—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no more sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the absence of proof of the tightening of this wire before receiving the proper signal, which was a necessary fact, the court would not have been justified in submitting the case to the jury, and it is not necessary to notice the other questions discussed by counsel at the hearing.

The judgment is affirmed.

CONTACT WITH ELECTRIC WIRES OF ANOTHER
COMPANY.

ECONOMY LIGHT & POWER CO. v. SHERIDAN.

Illinois; Supreme Court.

1. INJURY TO LINEMAN OF TELEPHONE COMPANY BY CONTACT WITH DEFECTIVELY INSULATED ELECTRIC LIGHT WIRE; PRESUMPTION OF NEGLIGENCE. — The plaintiff's intestate was a lineman in the employ of a telephone company, and while engaged in his duties as such upon one of the poles of the telephone company received a shock of electricity, fell from the pole and was instantly killed. It appeared that the decedent was standing on the cross-arm of the pole upon which an electric light wire was strung, holding in his hands a telephone suspension wire which hung to the ground; the shoes of the decedent were wet. The electric light wire was defectively insulated and was charged with an electric current of about 1,100 volts pressure; while in this position the decedent was heard to scream as if in great pain and he fell from the pole to the ground. There was no direct proof that he came in contact with the electric wire. It was held that the facts and circumstances were sufficient to justify an inference that a contact with the electric wire was the cause of his death, and that it was, therefore, proper to submit the case to the jury.
2. HYPOTHETICAL QUESTION.—The facts and circumstances being sufficient to justify an inference that the electric light wire was defectively insulated and that the decedent came to his death by contact therewith, a hypothetical question assuming such facts was properly allowed.

Appeal by defendant from a judgment of the Appellate Court affirming a judgment for the plaintiff. Decided December 16, 1902; reported 200 Ill. 439, 65 N. E. 1070.

Garnsey & Knox, for appellant.

Donahoe & McNaughton, for appellee.

Opinion by Boggs, J.:

The appellate court for the second district affirmed the judgment entered in the Circuit Court of Will county in favor of the appellee administrator against the appellant company in the sum

of \$3,000, and the appellant company has brought the cause here by a further appeal.

But two questions of law arise: First, whether the court erred in overruling the motion entered by the appellant company at the close of all evidence to direct the jury to return a peremptory verdict in its favor; and, second, whether the court erred in overruling the objections of appellant company to a hypothetical question propounded by counsel for the appellee. These questions require brief reference to the facts of the case.

The action was case, under the statute, to recover the damages occasioned by the death of Martin Sheridan, appellee's intestate, to his mother and brothers and sisters. On the 20th day of November, 1899, Martin Sheridan was in the employ of the Chicago Telephone Company as a lineman. The appellant company, with the consent of the Chicago Telephone Company, had strung certain of its electric light wires on cross-arms attached to the poles of the telephone company. Said deceased ascended one of such poles for the purpose of adjusting a suspension wire thereon above the cross-arm of the appellant company. He fell from thence to the ground, and was instantly killed. The theory of the appellee administrator was that the deceased, while holding the suspension wire, which came down to the ground, came in contact with the electric light wire of the appellant company; that the electric light wire was charged with an electric current of from 1,000 to 1,100 volts power, and was imperfectly insulated or wholly uninsulated at the point of contact, and that the deceased received a current of electricity which caused him to fall from the pole to the ground; and that he was thereby instantly killed. The ground of the motion for a peremptory verdict was that there was no evidence "(1) that the wires of the defendant at the point on the pole where they were connected with the pin were not insulated; or (2) that the decedent came in contact with those wires; or (3) that he had hold of the suspension cable at that time."

It was proven that the shoes of the deceased were wet; that he was standing upon the cross-arm on which the electric light wire

was strung, and that he held in his hand the suspension wire of the telephone company, which hung down to the ground; that the electric light wire passed around a pin in the cross-arm six or eight inches from the pole, and that the deceased man's foot was resting on the cross-arm, between the pin and the pole; that there was no insulator on the pin; and there was testimony that the electric light wire was an old wire, which had been taken down and put up at various times, and was "ragged in various places along it; in some places there was insulation on the wire, and in other places there was not;" that the wire was bare of insulation on each side of the cross-arm, and that it was charged with an electric current of about 1,100 volts pressure; that while in this position the deceased was heard to scream as if in great pain; that "his eyes were turned up in his head;" that his features were convulsed and contorted as if in pain and great suffering; and that he fell from the pole to the ground. There was no direct proof that the deceased came in contact with the electric light wire, and that he received an electrical shock which threw him from the pole to the ground; but, from the facts and circumstances proven, it might fairly and reasonably be inferred that such was the cause of his death. That such was the fact was susceptible of being proven by circumstantial as well as by direct testimony.

The objection to the hypothetical question was that it assumed there was proof the deceased came in contact with the electric light wire, and that such wire, at the cross-arm, was bare, and the insulation worn off. As we have seen the facts so assumed in the hypothetical question were within the scope or range of the evidence. For the purpose of framing the hypothetical question, these assumptions of facts were sufficiently proven by the proof of facts and circumstances so associated with the facts assumed as to render the existence of the assumed facts reasonable and probable. 1 Greenl. Ev. sec. 13; *Railway Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447; 8 Enc. of Pl. & Prac. 757. The hypothetical question left the jury entirely free to determine for themselves the truth or falsity of the facts assumed for the purpose of fram-

ing the question, and the court did not err in permitting it to be propounded.

There is no error in the record, and the judgment is affirmed. Judgment affirmed.

Injuries to Employees of One Company Caused by Defectively Insulated Wires of Another Company.

1. Failure to use ordinary care in stringing wires to avoid contact.
2. Duty as to insulation of wires.
3. Degree of care to protect linemen of other companies.
4. Maintenance of guard wires.
5. Contract relieving company of liability.
6. Joinder of parties.

1. Failure to use ordinary care in stringing wires to avoid contact.—It is the duty of an electric company to use due care in the stringing of its electric wires of dangerous voltage across and along the streets of a city, regardless of the existence of other wires, of the possibility of contact therewith, of the generation of high tension from its wires, and mindful that such other wires from time to time might require the attention of linemen and other workmen in the matters of repair, readjustment, clearance, insulation and restoration to their normal functions. If wires are strung so as by sagging or other natural and ordinary causes, to come in contact with the wires of other companies, the companies stringing such wires may be found guilty of negligence. *Paine v. Elec. Ill. & P. Co.*, 7 Am. Electl. Cas. 651, 64 App. Div. 477, 72 N. Y. Supp. 279; *Dwyer v. Buffalo General Elec. Co.*, 7 Am. Electl. Cas. 456, 20 App. Div. 124, 46 N. Y. Supp. 874; *Witleder v. Citizens' Elec. Ill. Co.*, 7 Am. Electl. Cas. 581, 62 N. Y. Supp. 297; *Clarke v. Nassau Elec. R. R. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. 51, 41 N. Y. Supp. 78. In regard to the protection of the traveling public, it has been held that where a line of telephone wires carrying normally a harmless current is crossed beneath by a line of wires carrying normally a deadly current, and its possible contact with the line carrying such deadly current could be prevented by the use of guard wires, the company may be held guilty of negligence for its failure to furnish such guard wires. *Rowe v. N. J. Telephone Co.*, 7 Am. Electl. Cas. 626, 66 N. J. L. 19, 48 Atl. 523.

2. Duty as to insulation of wires.—Each of several electrical companies which by agreement keep a common pole to support their wires, owes the duty to take all reasonable precautions to prevent injury to the servants of any of the others, who may be sent there in pursuance of the common right; and this duty is not so circumscribed that it ceases to exist if a servant of one company happens to rest hand or foot upon a cross-arm belonging to another company, or to touch its wires. The fact that a wire is insulated at all is evidence that the company maintaining it is aware that a person coming upon

the pole may come in contact with it, and of the dangers of such contact. The fact that a wire appears to be insulated is calculated to inspire reliance upon its safety. The company is, therefore, chargeable with a high degree of care to see to it that the insulation is not defective. *Newark Elec. L. & P. Co. v. Garden*, 6 Am. Electl. Cas. 275, 78 Fed. 74, 23 C. C. A. 649; see, also, *McAdam v. Central Ry. & Elect. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445, 35 Atl. 341; *Lincoln St. Ry. Co. v. Cox*, 6 Am. Electl. Cas. 352, 48 Neb. 807, 67 N. W. 740.

In the case of *W. U. Tel. Co. v. McMullen*, 6 Am. Electl. Cas. 338, 58 N. J. L. 155, 33 Atl. 384, a judgment for the plaintiff was sustained where it appeared that the plaintiff, a lineman of the defendant, was injured by a shock received by him in the ordinary course of his employment; it also appeared that the ordinary telegraph current was insufficient to injure persons handling the wires; that electric light wires were attached to the telegraph poles, so near the one where the plaintiff was injured that they resulted in making the telegraph wires dangerous, of which the plaintiff had no notice.

3. Degree of care to protect linemen of other companies.—It is the duty of an electric light company whose wires are maintained near telephone wires to know that linemen of the telephone company must, in the course of their duties, come into close proximity with the electric light wires. It is the duty of a company maintaining and using in its wires a deadly current of electricity, to furnish perfect protection at those points where people are liable to come in contact with the wires. "The highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business," is not enough. *Overall v. Louisville Elect. Co.*, 7 Am. Electl. Cas. 521, 21 Ky. L. Rep. 886, 54 S. W. 1102; *Schweitzer v. Citizens' Gen. Elect. Co.*, 7 Am. Electl. Cas. 571, 21 Ky. L. Rep. 608, 52 S. W. 830.

4. Maintenance of guard wires.—Although the absence of guard wires may be an element of negligence, yet it cannot be said, as a matter of law, that either or both of two companies maintaining different lines of wire in the same street are bound, in the absence of negligence to maintain guard wires for the purpose of preventing the harmless wires of the one from coming in contact with the dangerous wires of the other. *Keasbey on Electric Wires*, sec. 269. See note by Mr. Keasbey to *New York & N. J. Teleph. Co. v. Bennett*, 7 Am. Electl. Cas. 543, 547, and cases therein cited.

5. Contract relieving company of liability.—Where a telephone company maintained its wires on the poles of an electric street railway company, under a contract by which it agreed to assume all risks of injuries to its employees, and an employee of the telephone company, while voluntarily repairing a wire of the railway company, received a shock and consequent injuries, it was held that there was no cause of action against the railway company. *Sias v. Lowell, L. & H. St. Ry. Co.*, 179 Mass. 343, 7 Am. Electl. Cas. 639, 60 N. E. 974.

6. Joinder of parties.—In the case of *Western Union Teleg. Co. v. Griffith*, 7 Am. Electl. Cas. 602, 111 Ga. 555, 36 S. E. 859, it was sought to recover damages for injuries alleged to be due to the circumstance that tele-

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graph wires were so maintained relatively to electric light and electric street railway wires that heavy currents of electricity were liable to be conveyed to the telegraph wires and thence to the ground; and it was held that all the companies maintaining the wires were properly joined as defendants. See, also, *Rowe v. N. J. Teleph. Co.*, 7 Am. Electl. Cas. 626, 66 N. J. Law, 19, 48 Atl. 523.

KNOWLTON V. DES MOINES EDISON LIGHT CO.

Iowa; Supreme Court.

1. **INJURY TO LINEMAN OF TELEPHONE COMPANY BY CONTACT WITH ELECTRIC WIRE; DEGREE OF CARE.**—The plaintiff's intestate was a lineman in the employ of a telephone company and while walking along the ground stretching a telephone wire which was attached to one telephone pole preparatory to connecting it with another telephone pole, the wire came in contact with an electric light wire charged with a current of 2,500 voltage, and he received a fatal shock. The electric light system was not yet in full operation at the time. When the decedent and his co-employees began the replacing of the telephone wire just prior to the accident the electric light current was not on; but at some time during the prosecution of the work the current was turned on by the employees of the electric light company for the purpose of testing the circuit. The defendant company was held negligent; it was the duty of the defendant in the exercise of reasonable care to use a high degree of diligence and foresight in the construction and maintenance of its lines in a safe condition.
2. **USE OF PROPER INSULATING MATERIAL.**—It is proper to submit to the jury the question as to whether or not a sufficient and proper insulating material is used to prevent the escape of the electric current.
3. **ORDINANCE REQUIRING USE OF "WATERPROOF" INSULATION.**—Where a city ordinance requires the wires of electric lighting companies to be covered with "waterproof" insulation which, if used, would probably have prevented the passing of the current from the light wire to the telephone wire, and it appeared that the defendant had used what is called "weather-proof" insulation, it is proper for the court to instruct the jury that if insulation used by it was not "water-proof," as required by such ordinance, and was not as effectual in preventing the passage of the current to a wire in contact therewith, that the defendant was negligent.
4. **EXERCISE OF DUE CARE BY DECEDENT.**—The burden of proving freedom from contributory negligence does not require direct affirmative proof of any particular acts of care on the part of the person injured. Evidence of

the facts and circumstances connected with and surrounding the injury may be such as to justify the inference of due care. If the decedent believed that the defendant had properly performed its duty as to covering its wires with "water-proof" insulation, which might have prevented the injury, he cannot be charged with contributory negligence for omitting precautions which he might have taken to avoid the danger, and for permitting the wire which he was handling to come in contact with the defendant's electric light wire.

5. CURRENT IN ELECTRIC LIGHT WIRE IN DAY TIME.—If the decedent, as a reasonable man, was justified in believing that no current would pass through the defendant's electric light wire while he was at work about it, then he was not required in the exercise of reasonable care to take precautions against such current. It is proper for the court to call the attention of the jury to the evidence as to the probability or possibility of a day current being turned through an electric light wire as one of the circumstances to be taken into account in determining whether the decedent exercised due care.

Appeal by defendant from judgment for plaintiff. Decided June 3, 1902; reported 117 Iowa, 451, 90 N. W. 818.

Connor & Weaver, for appellant.

Clark & McLaughlin, for appellee.

Opinion by McLAIN, J.:

In November, 1899, the deceased was in the employ of the Mutual Telephone Company as lineman, and was sent with another lineman, under the direction of a foreman, to repair the wires of the telephone company at a place where the telephone wires of his company and of another telephone company were supported on poles, which also furnished support to a lighting circuit of the defendant company, as well as to the cross wires supporting the trolley wire of a street car company. By ordinance of the city, this common use of the poles was authorized, and it is immaterial, therefore, that the poles did not belong to the defendant, their right to the use thereof being unquestioned. The accident causing the death of the deceased happened in the forenoon, and it appears without question that, the night before, de-

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ceased and other linemen of the Mutual Telephone Company had visited this place and discovered some "trouble" with the company's line, due to the escape of electricity from defendant's wire to a tree near which the telephone wires were also stretched. At that time the telephone wires were cut out between the poles on either side of the tree, and when deceased and his fellow workmen came back to this place on the morning of the accident they first cut away the portion of the tree which interfered with the wires, and then proceeded to replace the telephone wires which had been cut out the night before. For this purpose Dean, a fellow lineman of deceased, climbed the telephone pole, to which a wire from the central station was still attached, and connected therewith one end of a wire which had been cut out the night before, while deceased, on the ground, proceeded to straighten out the wire and stretch it to the next pole, for the purpose of attaching to it enough more wire to make the connection with the remainder of the line. The supports for the telephone wire which was being stretched were higher on the pole than the support of the defendant's electric lighting wire, and while deceased was stretching out the telephone wire from its point of connection on the pole where it had been attached, walking along the ground towards the next pole, the telephone wire crossed and came in contact with defendant's electric lighting wire, and deceased received a fatal shock of electricity passing from the electric lighting wire through the telephone wire, and through his body to the ground. Deceased was handling the telephone wire without rubber gloves, and without taking any precautions to prevent the grounding of the electric lighting current through his body. With regard to the current in the electric lighting wire, it appears that it had been turned on the night before when the telephone wire was cut out, for at that time the electric lights were burning, although the line, which had recently been constructed, was not yet in full operation; but at the time when deceased and his co-employees commenced to replace the telephone wire, just before the accident, the electric lighting current was not on, for the lamps were not burning; but at some time during the prosecution of the work of replacing the telephone line at this

place the electric lighting current was turned on by the employees of defendant for the purpose of testing the circuit, and the escape of electricity from defendant's wire to the telephone wire caused the death of deceased.

Several allegations of negligence were made in the plaintiff's petition, one of them being the act of defendant's employees in turning on a current in the electric lighting wire in the daytime, when deceased would have no reason to expect that there would be a current in such wire, and without taking any precaution to ascertain whether any one was working along the line of the circuit, or to warn persons so working that the current was being so turned on. But the trial court directed the jury not to consider as negligence this action on the part of defendant's employees, and submitted the case on the theory that defendant had the right to transmit an electrical current through its wires in the daytime when such current was not necessary for electric lighting purposes, without ascertaining whether the transmission of such current would in itself be dangerous to persons not in its employ working along the line, and we must determine this appeal on that theory of the case. The allegations of negligence on the part of defendant which were submitted to the jury were in establishing and maintaining electric lighting wires without proper and sufficient insulation, in view of their proximity to wires of other companies, and the character of the current said wires were intended to convey, and also in failing to keep its wires thoroughly and properly covered with "waterproof" insulated material, and "insulated with the best water insulation," as required by ordinance of the city. Aside from any provision in the city ordinance, it was the duty of defendant to use reasonable care to prevent the escape of electricity from its lines in such way as to cause injury to persons who might lawfully be within the reach of the danger incident to the escape of electricity from such lines; and in view of the highly dangerous character of an electrical current of such power as to operate arc lights, which was in this case shown to be of about 2,500 voltage, the exercise of reasonable care on the part of defendant involved the use of a high degree of

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diligence and foresight in the construction and maintenance of its lines in a safe condition. *Electrical Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Perham v. Electric Co.*, 7 Am. Electl. Cas. 487, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. In some cases the duty of electric lighting and power companies to prevent the escape of dangerous currents of electricity is likened to that of the keeper of a ferocious animal. See *Railroad Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Keasbey*, *Electric Wires*, secs. 239, 249. But it is certainly not the rule of law applicable to such cases that the company is absolutely liable for any injury done by escaping electricity. Such a company is engaged in conferring a public benefit, and, although it is by the nature of its business bound to exercise great care, yet the care required is, after all, only that reasonably consistent with the performance of its functions. It should along the highway and in proximity to places where persons may rightfully go, insulate its wires, or by putting them out of the way avoid danger to persons who without negligence might otherwise be injured by casually coming in contact with them. *Clements v. Light Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Griffin v. Light Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. And when the lighting wire is supported on poles which support other electrical wires, which must be attended to by linemen of other companies, the company operating the lighting wire is bound to know that there is danger of such linemen coming in contact with the lighting wire and being injured thereby, if it is not properly insulated, and it will be negligent if it fails to use proper precautions against injury to such linemen of other companies. *Illingsworth v. Light Co.*, 5 Am. Electl. Cas. 312, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Power Co. v. Mason's Adm'r*, 39 U. S. App. 416, 23 C. C. A. 649, 78 Fed. 74. But the duty to insulate for the protection of persons who may come in contact with the wires does not exist as to parts of the line where no one could reasonably be ex-

pected to come in contact with the wire. *Hector v. Light Co.*, 7 Am. Electl. Cas. 568, 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300.

In cases we have referred to, the complaint has been as to failure to cover joints with insulating material, or to keep the insulation complete and perfect at points where persons would be likely to come in contact with the wires. There is no particular conflict in the authorities as to the duty of electric light companies in this respect, but the controversy in this case relates to a matter of a somewhat different character. It is contended that the method of insulation, that is, the kind of covering put on the wire used by defendant on its line, was not sufficient, and that by reason of its insufficiency the electrical current passed from the lighting wire to the telephone wire so as to cause the death of deceased, whereas it would not have done so had a different kind of insulation been used. The court did not instruct the jury directly on the theory that it was the duty of the defendant to use an insulating material that would absolutely prevent the escape of the current under such circumstances, but left it to the jury to say whether, in the use of such wire as was used, the defendant exercised reasonable care, and of this defendant has no cause to complain.

But it further appears that at the time of the accident the ordinances of Des Moines required that the wires of electrical lighting companies should be covered with "water-proof" insulation, and there was some evidence to the effect that such a covering consists largely of rubber, and would probably have prevented the passing of the current in this case from the lighting wire to the telephone wire, while the evidence shows that defendant's wires were in fact provided with what is called "weather-proof" insulation, not composed to any extent of rubber, but consisting of a kind of webbing or netting, woven around the wire, and saturated with tar, or some waxy substance, and that this kind of insulation is not so effectual in preventing the passing of an electrical current between two wires in contact, and the court charged the jury on the theory that if the insulation used was not

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“waterproof” insulation as required by the ordinance, and was not as effectual in preventing the passage of an electrical current to a wire in contact as a “waterproof” insulation would be, then the defendant was negligent. With reference to this theory of the court it is contended for appellant that the adoption of some other form of insulation than that prescribed by the ordinance would not necessarily constitute negligence. But it seems to us plain that the safety of persons who might be in danger by reason of contact with the wires, was within the contemplation of the council in passing the ordinance, and that a violation of the provisions of the ordinance would in itself be negligence. *Clements v. Light Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Mitchell v. Electric Co.*, 7 Am. Electl. Cas. 644, 39 S. E. 801; *Smith v. City of Pella*, 86 Iowa, 236, 53 N. W. 226; *Reynolds v. Hindman*, 32 Iowa, 146; *Dodge v. Railroad Co.*, 34 Iowa, 276; *Correll v. Same*, 38 Iowa, 120, 18 Am. Rep. 22.

Error is also assigned on the action of the court in leaving it to the jury to determine what was meant by “waterproof” insulation, as required in the ordinance, but in this there was no error. While it is the duty of the court to construe the language of an ordinance, it is proper to leave the application of that language to the facts, where such application depends on evidence, to the determination of the jury. It was contended for defendant in the lower court that the requirement as to “waterproof” insulation was inserted by inadvertance, but we find no support for any such contention.

There was then evidence proper for the jury on the question of whether defendant was negligent in not using the proper kind of insulation. But to entitle the plaintiff to recover it was also essential to show that deceased, at the time of the injury, was in the exercise of due care, and it is with reference to this matter that the more serious complaint is made on the part of appellant as to the action of the court and jury. This is a question wholly independent and distinct from that of the defendant's negligence. The burden of proof on this question was of course on the plain-

tiff. In the absence of any evidence as to negligence, or want of negligence, of the deceased, the presumption arising from the instinct of self-preservation might be effectual, but here the evidence clearly shows the circumstances under which deceased received his injury, and there is no occasion to apply the presumption. *Bell v. Town of Clarion*, 113 Iowa, 126, 84 N. W. 962. It is contended for the appellant that, excluding this presumption, there is no evidence of care on the part of deceased, and that it affirmatively appears he omitted precautions which he might have taken to avoid danger, such as wearing rubber gloves, standing on a dry board or on the wagon which he and his fellows had brought to the place instead of on the damp ground, using a rope to keep the telephone wire from coming in contact with the electric light wire and the like; and that therefore a verdict for defendant should have been directed on motion. This contention is supported by reference to a case quite similar in its facts, that of *Judge v. Lighting Co.*, 21 R. I. 128, 42 Atl. 507. But it is not true that the doctrine was announced in that case, and recognized in this court by a long line of decisions, that the burden of proving freedom from contributory negligence in cases of personal injury requires direct affirmative proof of any particular acts of care on the part of the person injured. Evidence of the facts and circumstances connected with and surrounding the injury may be such as to justify the inference of due care. *Gorman v. Railroad Co.*, 78 Iowa, 509, 43 N. W. 303; *Fish v. Railway Co.*, 96 Iowa, 702, 65 N. W. 995. In the case before us such facts and circumstances were fully shown, and in this respect it is distinguishable from the *Judge case*, above cited, for in that case there was no evidence as to how the accident occurred. There is another distinction between the cases which is very important. In the *Judge case* it does not appear that the electric light wire was insulated, or that deceased had any reason to suppose that it was insulated, while here, as we have pointed out, it appears that it was the duty of defendant to have its wire covered with waterproof insulation, which would have afforded at least a better protection than the covering actually used.

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It is clear that the defendant's duty to insulate its wires as required by the city ordinance is of controlling importance, not only with reference to the question of defendant's negligence, but also in connection with the question of contributory negligence of deceased. If deceased was justified as a reasonably prudent man in believing that such insulation as the ordinance required would make a contact between the telephone wire which he was handling and defendant's wire free from danger to him, and had reasonable grounds to believe that defendant's wire was thus insulated, then, plainly, no duty to avoid contact between the two wires was imposed upon him. Whether he must have had good reason to believe, as the evidence tends to show, that the defendant had not complied with the ordinance in this respect, and whether he should have known as an experienced lineman that such contact was dangerous no matter what the character of the insulation, were plainly questions for the jury. Certainly no court would be justified in saying of its own knowledge, as matter of law, that there was necessarily such danger in a contact between the two wires under any possible circumstances as to make failure to avoid such contact *per se* negligence, and there was not such conclusive evidence that deceased must have known it would be dangerous as to justify this court in setting aside the verdict for want of support in the evidence on this point.

The same reasoning applies to the action of the court in directing the jury to consider the evidence as to the knowledge of deceased with reference to whether there was a "probability or possibility that defendant might turn the current on its wire." If as a reasonable man he was justified in believing that no current would pass through defendant's wire while he was at work about it, then he was not required in the exercise of reasonable care to take precautions against such current. Whether or not he was justified in such belief was a question for the jury under the evidence. It is not enough to say in response to this that defendant had a right to turn its current into this wire in the daytime, and that it would not constitute negligence on defendant's part to do so. The negligence of defendant consisted in not properly

insulating its wires, and we are now considering the danger of a day current only as bearing on the care required of deceased. Certainly, there may be acts which one has a right to do, but which another is not reasonably bound to anticipate. We think, therefore, that the court did not err in calling the attention of the jury to the evidence as to the probability or possibility of a day current as one of the circumstances to be taken into account in determining whether deceased exercised due care. Under the law and the testimony of the witnesses, the court was justified in directing the jury to consider the evidence as to these and other matters in determining whether there was contributory negligence on the part of deceased. See *Illingsworth v. Light Co.* (Mass.), 5 Am. Electl. Cas. 312, 37 N. E. 778, 25 L. R. A. 552; *Keasbey, Electric Wires*, secs. 264, 265. In support of the view that, in the absence of any reason to believe the contrary to be true, deceased had a right to rely on the defendant's wire being properly insulated the following cases are directly in point: *Mitchell v. Electric Co.* (N. C.), 7 Am. Electl. Cas. 642, 39 S. E. 801; *Will v. Illuminating Co.* (Pa.), 7 Am. Electl. Cas. 644, 50 Atl. 161; *Clements v. Light Co.*, 4 Am. Electl. Cas. 481, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *McAdam v. Electric Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445, 35 Atl. 341. The cases of *Anderson v. Light Co.* (N. J. Law), 7 Am. Electl. Cas. 567, 46 Atl. 593, and *Wood v. Electric Co.*, 185 Pa. 529, 39 Atl. 1111, in which contributory negligence of persons injured by an electric current received from a wire was held as matter of law to be such as to preclude recovery on account of such injuries, involve quite different facts from those before us. In each it appeared that the person injured had voluntarily touched the wire out of mere curiosity or bravado, to ascertain if it were charged, or to prove it not dangerous. Certainly, one who without any occasion to do so takes such risk is not on the same footing as one who is required to engage in the business of working about an electric light wire always attended with danger of some accident, no matter how little to be expected in the particular instance. Of course there was in this case no question of assump-

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tion of risk, for deceased was not a servant of defendant, and for this reason the case of *Junior v. Power Co.*, 5 Am. Electl. Cas. 369, 127 Mo. 79, 29 S. W. 988, is not in point.

Other errors in the giving of instructions and the admission or exclusion of evidence are argued, but we think that what has been said sufficiently indicates the views of this court on the questions raised.

Complaint is made as to the amount of the judgment, even after the acceptance by plaintiff of the reduction required by the court, but without going into a discussion of the question it is enough to say that we find the matter was properly submitted to the jury, and that, if the verdict had been for not to exceed the amount which was finally allowed, it would have been sustained by the evidence. That a return of an excessive verdict does not necessarily show such passion and prejudice as to require the entire setting aside of the verdict, see *Doran v. Railway Co.* (decided at present term), 90 N. W. 815.

Affirmed.

See, also, *Economy L. & P. Co. v. Sheridan*, ante, p. 795; *Cumberland Teleph. & Teleg. Co. v. Ware's Adm.*, post p. 811; *Klages v. Gillette-Herzog Mfg. Co.*, post, p. 818; *Hart v. Alleghany Co. L. Co.*, post, p. 832; *Jackson & Suburban St. R. Co. v. Simmons*, post, p. 834.

Municipal ordinances.—As to pleading municipal ordinances requiring electric company to hang wires at a certain height, and to properly insulate such wires, see *Brush Elect. L. & P. Co. v. Lefevre*, 7 Am. Electl. Cas. 598, 93 Tex. 604, 57 S. W. 640. Where a city ordinance requires an electric light company to insulate its wires, an absence of insulation is *prima facie* evidence of negligence. *Mitchell v. Raleigh Elect. Co.*, 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801.

In the case of *Clements v. Louisiana Elect. L. Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, it was held by the Supreme Court of Louisiana that the failure of the defendant company to have the splices on its wires perfectly insulated, when so required to do by the ordinance of the city, was negligence on its part. The ordinance being a contract with each and every inhabitant of the city, its standard of duty was fixed by it, and its failure to comply with it was negligence.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. WARE'S ADM'X.

Kentucky; Court of Appeals.

1. **DEATH OF LINEMAN CAUSED BY ELECTRIC SHOCK; CONCURRENT NEGLIGENT ACTS.**—The plaintiff's intestate was employed by the defendant telephone company in stringing telephone wires along poles belonging to such company. In performing this work it became necessary to stretch the telephone wire over electric light wires, and in so doing the wire coming in contact with the electric light wire became charged with electricity, resulting in the death of the decedent. The plaintiff sought to recover from the city and its contractor, who had strung the electric light wire, on the ground that such wire was not properly insulated, and against the telephone company on the ground that it was guilty of negligence in allowing its wire to come in contact with such electric light wire. It was held that the suit could properly be maintained against the three defendants, since the concurring negligence of all of them produced the decedent's death.
2. **EFFECT OF INSTRUCTION TO JURY TOO FAVORABLE TO ONE OF THE DEFENDANTS.**—An instruction more favorable to the city and to the contractor than they were entitled to receive as against the plaintiff is not a prejudicial error for which the appellant telephone company can complain. Although they were thereby permitted to escape a recovery against them, the liability of the telephone company for its tort still remained. The telephone company cannot, therefore, complain of an instruction to the jury which did not properly define the degree of care which the contractor and the city should have exercised in stringing and maintaining its wires upon the streets.
3. **INSTRUCTION AS TO NOTICE OF DANGER.**—An instruction to the effect that although the jury believe from the evidence that the electric light wire was not properly insulated, if they further believe from the evidence that the agents and servants of the telephone company knew or had reason to know of the danger of bringing their wire in contact with the city's wire, and they might by reasonable care have avoided such contact, and that they negligently brought such wire into such contact, and but for such negligence the plaintiff's intestate would not have been killed, if the jury find for the plaintiff they should find against said telephone company and in favor of the other defendants, is not to be construed as instructing the jury to find against the telephone company, although the plaintiff's intestate had knowledge of the defect in the electric light wire. The effect of such instruction was that if the jury found in favor of the plaintiff it could only find against the telephone company. This instruction was based upon the assumption that there could be no recovery against the city and its contractor, if the agents of the telephone company knew of the danger of bringing the wire in contact with the electric light wire, and might, by the exercise of reasonable care, have avoided it.

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Nor does such instruction authorize a finding against the telephone company, although the negligent act which resulted in the death of the decedent was that of a fellow servant, other instructions being given fully, covering the question as to whether or not the injury was caused by the negligence of a superior in authority or of a fellow servant.

Appeal by telephone company from judgment for plaintiff.
Reported 24 Ky. Law Rep. 2519, 74 S. W. 289.

Sweeney, Ellis & Sweeney, W. S. Morrison, C. M. Finn, Watkins & Thompson, William D. Granberry, and Humphrey, Burnett & Humphrey, for appellant.

Wilfred Carico and Birkhead & Clements, for appellee.

Opinion by PAYNTER, J.:

This action was instituted by the appellee against the city of Owensboro, Westinghouse, Church, Kerr & Co., and Cumberland Telephone & Telegraph Company, to recover damages for the death of her intestate, Thomas Ware. A recovery was sought against the defendants because of the alleged concurring negligent acts of each, which caused his death. The city of Owensboro had made a contract with Westinghouse, Church, Kerr & Co. to construct an electric light plant in the city. The work had progressed, poles had been erected, and wires were strung and charged with electricity. The Cumberland Telephone & Telegraph Company was engaged in stringing a wire along Ann street, in the city of Owensboro, from its exchange building to the messenger office, to do which it required a wire to be placed upon the cross-arms of its poles along Ann street, which wires were elevated above the electric light wires which crossed that street. There were two poles south of the electric light wires. The decedent ascended the first pole, carrying up a wire to which was attached a rope. He threw it over the cross-arm, and dropped an end of the rope to the ground, whereupon Tom Potts, another employee, took it and ascended the next pole, and did likewise; whereupon Lee, who was in charge of the force, took it up and threw it over the electric light wires, and he then took hold of the rope with the

wire attached, and pulled it across the electric light wires. While pulling it over the electric light wires, it came in contact with them, thereby becoming charged with electricity, and as a result Ware was instantly killed. The testimony tends to show that the rope attached to the wire was too short to enable them to carry the wire from the pole up which Tom Potts had ascended to the next pole to which it was to be attached, which had been ascended by Jug Potts, another employee. The handling of the rope was done in such a way that the jury was authorized to conclude that the wire was brought in contact with the electric light wires as the result of Lee's negligence. The plaintiff sought to recover against the three defendants upon the ground that the electric light wire was not properly insulated, and the telephone company, being aware of that fact, was guilty of negligence in allowing its wire to come in contact with it. By an amended petition the plaintiff pleaded in the alternative that, if the electric light wire was properly insulated then the telephone company was guilty of negligence on account of the manner in which it pulled its wire over and against the electric light wire, and thus caused Ware's death. The trial resulted in a verdict for the city of Owensboro and Westinghouse, Church, Kerr & Co., and a verdict against the appellant.

It is urged that the petition is not good, and that a cause of action cannot be maintained, because the defendants were not joint tort feors. If the city of Owensboro and Westinghouse, Church, Kerr & Co. strung an electric light wire and left it remaining without proper insulation, and the telephone company negligently brought its wire in contact with the electric light wire, then concurring negligent acts produced Ware's death; and under the doctrine of *Pugh v. C. & O. R. R.* (Ky.), 39 S. W. 695, an action can be maintained against one or against all of the defendants. Where several persons jointly commit a tort, the injured party has his election to sue all or some of the parties jointly, or some of them separately. *Buckles, etc., v. Lambert*, 4 Metc. 330; *Hill and Bergen v. Harris*, 4 Bush. 450; *Swigert, etc., v. Graham*, 7 B. Mon. 661. If the city of Owensboro and Westinghouse, Church, Kerr & Co. strung an electric light wire which was not

properly insulated, they were guilty of negligence, and their negligent act continued and was as effective in the production of the death of Ware at the time the telephone wire came in contact with it as it would have been had the telephone wire been strung at the same instant the electric light wire was, and the contact had then produced his death. If the electric light wire was not properly insulated, the city of Owensboro and Westinghouse, Church, Kerr & Co. were wrongdoers continuously until the act which resulted in the death of Ware. Their act in maintaining the wire necessarily concurred with the act of the telephone company in producing the death of Ware.

Again, it is urged that the petition is not good in stating a cause of action in the alternative, because appellant claims that it is not averred that the pulling and drawing of the telephone wire over the electric light wire was carelessly and negligently done. When the whole petition is taken together, we think these averments are sufficiently made. Under the instructions no recovery could have been had except the jury believed that such pulling was carelessly and negligently done.

Before entering upon the consideration of the question as to whether the court erred in giving instructions to the jury, it may be said that, if it gave an instruction more favorable to the city of Owensboro and Westinghouse, Church, Kerr & Co. than they were entitled to receive as against the plaintiff, that fact could not be a prejudicial error for which appellant can complain. Although they were thereby permitted to escape a recovery against them, appellant's liability for its tort still remained.

The appellant complains of instruction No. 6, which reads as follows: "The court instructs the jury that, as a matter of law, the city of Owensboro had the right to construct and maintain an electric system for lighting its streets, but it was bound to use the highest degree of care, reasonably practicable, to have its wires perfectly insulated so as to be free from danger at all points where persons in the course of business or pleasure might come in contact with them; and if the jury believe from the evidence that its wires at the point of contact with the Cumberland Telephone & Tele-

graph Company were so insulated, and that the defendant Cumberland Telephone & Telegraph Company, by its servants and agents, negligently and carelessly, forcibly dragged its wires across the electric light wire, and so broke the insulation on the city's wire and thereby caused the death of plaintiff, the jury should, if they find for the plaintiff at all, find against the Cumberland Telephone & Telegraph Company only, and in favor of the other defendants." It is criticised because it is claimed the petition did not charge that the servants and agents did negligently and carelessly drag its wire across the electric light wire. Again, that the court did not properly define the degree of care which the electric light company and the city should have exercised in stringing and maintaining its wires upon the streets of Owensboro. The first criticism has been hereinbefore disposed of, and the second has been substantially so. Any error which the court may have committed in defining the degree of care which should have been exercised in stringing and maintaining electric light wires cannot be complained of by the appellant, for the reasons hereinbefore given. Besides, if they were properly insulated, under this instruction there could have been no recovery against the appellant, unless the jury believe that the death resulted by the negligence of the appellant's agents and servants in drawing its line over the electric light wires.

Appellant complains of instruction No. 13, which reads as follows: "Though the jury believe from the evidence that the electric light wires were not perfectly insulated, if they further believe from the evidence that the agents and servants of the Cumberland Telephone & Telegraph Company handling the wire by which plaintiff was killed (if he was so killed), including deceased, knew or had notice of the danger of bringing their wire in contact with the city's wires, and they might by reasonable care have avoided such contact, and they negligently brought into such contact, and but for such negligence the plaintiff would not have been killed—if the jury find for the plaintiff, they should find against said Telephone & Telegraph Company alone, and in favor of the other defendants." The appellant erroneously assumes that the court in

this instruction told the jury to find against it although Ware knew of the defect in the electric light wire, and with such knowledge, by his own negligence, brought the telephone wire in contact with the defective electric light wire. The court in this instruction does not tell the jury to find for the plaintiff, but in effect told it that, if it found for the plaintiff, it could only find against the appellant. This instruction was given upon the idea that there could be no recovery against the city of Owensboro and Westinghouse, Church, Kerr & Co., if the agents of the appellant handling the wire by which plaintiff's intestate was killed knew or had notice of the danger of bringing the wire in contact with the electric light wire, and might by the exercise of reasonable care have avoided it. Of course, if Ware knew that the electric light wire was not properly insulated, and he could have avoided by the exercise of proper care the bringing of the telephone wire in contact with the electric light wire, and negligently did so, and but for which the accident would not have happened, the plaintiff could not have recovered. However, plaintiff would have been entitled to a recovery against appellant had Lee, who was in charge of the force, known of the condition of the electric light wire and carelessly and negligently brought the telephone wire in contact with it, thus producing Ware's death. Again, it is urged that the instruction given by the court authorized the jury to find against the appellant although the negligent act which resulted in the death of the plaintiff was that of a fellow-servant. By instruction No. 1 the jury could not have found against appellant unless it believed Ware's death was produced by the negligent act of a person in charge of the work, etc. In instruction No. 2, the jury was expressly told that the company was not liable for the negligent act of a fellow-servant. By the third instruction the court submitted to the jury the question as to whether or not Rufus Lee was Ware's superior in authority and had the right to direct him. In view of these instructions, instruction No. 4, of which complaint is made, could not have been misleading, although the word "occasional" should not have been used in the instruction. It reads as

follows: "The court further instructs the jury that the rule of law is that, when one engages in the service of another, he undertakes, as between himself and his employer, to run all the ordinary risks incident to such service, and that includes the occasional carelessness, negligence, and unskillfulness of his fellow-servants engaged in the same line of duty; and if the jury believe from the evidence that the plaintiff, while in the employment of the defendant Cumberland Telephone & Telegraph Company, when he was killed was in the discharge of his duty as such employee, and if the jury further believe from the evidence that his death was occasioned either by his own negligence or want of skill, or that of a fellow-servant engaged in the same line of duty or service as explained in these instructions, and without which he would not have been killed, they should find for the defendants." Besides, under this instruction, the jury is expressly told that the plaintiff could not recover if the death was occasioned by "fellow-servants engaged in the same line of duty or service as explained in these instructions."

Counsel for the appellant contended that the appellant's negligence was not a proximate cause of Ware's death. Except for the act of Rufus Lee in bringing the telephone wire in contact with the electric light wire, Ware would not have been injured by the current of electricity which it carried. It was the current of electricity which produced the death. The efficient cause of the death was put in operation by the negligent act of Lee in bringing the telephone wire in contact with the electric light wire, and necessarily that act was a proximate cause of the death.

Appellant filed its affidavit stating its defense was in conflict with and unfriendly to that of its two codefendants. Thereupon it demanded the panel of the jury, and asked the privilege of striking three names therefrom as peremptory challenges. The question of peremptory challenges is controlled by our statute. In section 2258, Ky. St. 1899, it is provided that:

"Each party litigant in civil actions shall have the right of peremptory challenges to three jurors, and the right to challenge as now allowed by law."

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Section 2267, Ky. St. 1899, provides that:

"In all civil cases of jury trial the clerk shall draw from the box the names of eighteen of the jury, and write them, as drawn, on two slips of paper, and deliver one to each party, from which plaintiff and defendant may each strike three and return the list to the clerk, who shall call the first twelve names not erased and swear them as a jury to try the case. . . ."

It will be observed that the statute only contemplated that the names of eighteen of the jury shall be drawn from the box. It evidently does not contemplate that, where there are a plurality of plaintiffs and of defendants, a greater number than eighteen names shall at first be drawn from the box. In *Sodousky, etc., v. McGee*, 4 J. J. Marsh. 267, it was held that, if there be a plurality of plaintiffs, they are only one party litigant, and can challenge no more than three jurors. The same is true of defendants. The words "party litigant" appeared in the statute then under consideration as in the present statute. In construing them, the court said: "The parties litigant mean the antagonistic sides of the controversy. If there be a plurality of plaintiffs, they are all only one party litigant. So a plurality of defendants constitute one, and but one, party to the suit."

The judgment is affirmed.

KLAGES V. GILLETTE-HERZOG MFG. CO.

Minnesota; Supreme Court.

1. INJURY TO EMPLOYEE OF SUBCONTRACTOR.—Whether the doctrine of *respondet superior* applies to any particular case between the original contractor and a subcontractor is determined by the contract between the parties with reference to the right of the former to control or direct the latter as to the time, place, and manner of performing the work. The true relation of the parties in this respect is *prima facie* as expressed by the terms of the written contract, if there be one. But such contract is to be considered in view of the circumstances under which it was made and the manner in which the work was performed. If it appears that the writing was not executed in good faith to express the real relation of the parties,

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or if it appears that, notwithstanding such contract, supervision or control of the work was assumed by the original contractor, then the application of the rule is to be determined by the conduct of the parties.

2. CONTACT OF DERRICK CABLES WITH ELECTRIC WIRE.—Test applied in an action where appellant's husband was killed by an electric shock, caused by the cables of a derrick coming in contact with electric wires in the public street, and held, the evidence was not conclusive that the derrick was placed in position and operated by independent contractors. Held, the evidence was not conclusive that deceased was guilty of contributory negligence in attempting to push the loose part of a derrick cable, charged with electricity, from the open street into the gutter.
(Syllabus by the Court.)

Verdict for defendant. From an order denying a new trial, plaintiff appeals. Decided June 20, 1902; reported 86 Minn. 458, 90 N. W. 1116.

Young & Waite, for appellant.

James D. Armstrong, for respondent.

Opinion by LEWIS, J.:

The Gluek Brewing Company's buildings are situated on Marshall street, in Minneapolis, and the company entered into contracts for the construction of an addition to their refrigerator building. The dimensions of this new building were 100x100, varying in height from one story to 86 feet. Directly north of the space to be occupied by this building ran an alley 50 feet in width, which the company used in driving in and out in the conduct of its business; and immediately north of it was an ice house. The old and new buildings, as well as the ice house, faced east, flush with Marshall street; and to the west of the excavation, and between that and the river, was an open space of about 75 feet. On January 16, 1900, the brewing company entered into contracts with one Johnson for the masonry work, and with respondent for the structural and ornamental iron work, by the terms of which respondent agreed to furnish material, and within six months to erect and complete its work, according to certain plans and specifications, for the consideration of \$20,009.73. On June 4, 1900,

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respondent entered into the following contract with Windblad & Bruce:

"Gentlemen: We will pay you \$3.60 per ton for the erection of the structural ironwork, not including stairs, on our order No. 131 for Gluck Brewing Company, you to erect same in a satisfactory manner, according to plans, to bolt all lintels together as required, and paint all material one coat when not already painted. It is understood that you are to take this material from the place where it is now piled. You are to make out your payrolls, and we will pay the same on regular pay days at this office. If you want to discharge a man, we will pay him on presentation of regular discharge slip signed by you. It is understood that we are to furnish all tools and paint. Yours truly, Gillette-Herzog Manfg. Co., by Peter Lees, Supt."

The brewing company obtained from the mayor a license or permit to occupy for three months one-third of the street in front of the building to be erected for the disposition of building material, which stated that care be taken to incommode the public as little as may be during the construction of the building, and that the permit was granted upon the condition that proper guards would be placed around the material, and a suitable number of red lights kept burning through the night to warn the public of danger, and that it was revocable at the mayor's pleasure. On June 7, 1900, Winblad & Bruce began operations under their contract, selected their tools and derrick from respondent's supply, and respondent hauled the derrick to its indicated location near the southerly corner of the excavation, and not very far from the side of the street. A few feet to the southwest from it stood an electric pole, strung with wires belonging to the Minneapolis General Electric Company. Near the top of this pole were two cross-bars, one a little above the other; and the upper one, slightly lower than the top of the derrick, carried two "primary" and the lower one two "secondary" wires. On the day in question these primary wires were each charged with 1,000 volts of electricity, and the secondary wires carried about 108 volts. On the pole north, next to the one above described, was a "transformer," and one of the secondary wires went from this pole into the brewery for lighting purposes. The derrick was maintained in an upright

position by four wire cables running north, south, east, and west, respectively, and these were fastened to an iron band at the top of the derrick mast by means of iron hooks. The north cable was fastened to the upper end of the ice house, about 175 feet from the derrick mast; the one to the east was made fast to a post in a vacant lot about 75 or 80 feet back from the street. The southern guy rope was fastened to a post directly in front of the south corner of the office, and was loose and extended northerly in the gutter some 15 or 20 feet, and then curved back. The western cable had been pulled over the sidewalk primary wire and fastened to the window of the old malt kiln, and in operating the derrick it had come in contact with the primary wire, worn the insulator, and, as a consequence, that wire had become broken or burned off. The electric company were notified of the fact, and had repaired the break and restrung the wire, raising it about six inches above the guy line, so as to remove the danger of further contact. But afterwards, in operating the derrick, this cable, which the testimony shows was very slack when the burned wire was repaired, had become taut, and again in contact with the primary wire, lifting it some five or six inches from its natural position. Such contact transmitted to all the cables of the derrick an electrical current, which rendered it unsafe and impossible to work with, and the electric company was informed of the situation, and requested to adjust the difficulty. But before imminent danger was apprehended, and about 3 o'clock in the afternoon on June 8th, Johnson, one of the contractors, received a slight shock upon touching some part of the derrick, and from then on until about 5:30, when the accident here involved occurred, different persons received shocks upon contact with the derrick and certain charged portions of the ground near it. Herman Klages was an engineer in the employ of the brewing company and had charge of their electric lighting plant. About 5:30 o'clock he came out of the engine room, and joined the other men, and asked them what the matter was. One Proehl, who had just received a shock from the ground which threw him backward into the street, told him the ground and derrick were charged with electricity. The

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men then dared him to take hold of the cable, but he looked at the soles of his shoes, and said: "No, my feet are wet. It wouldn't be dangerous. It is only 108 or 110 volts." He asked Proehl to show him the spot where he had received the shock, and when pointed out to him, warned Proehl, and a man standing with him, away from the place, saying: "It is kind of dangerous. You better step back." At this time Klages was informed that the electric company had been notified of the condition. He then went across the street, and returned with a stick or dry board some two and a half feet long and four inches wide, one end narrower than the other, with which he began to poke the loose part of the cable toward the sidewalk. By the "fooling" of the men it had been pushed some four or five feet into the street, and the end of it had come in contact with an iron catch-basin cover in the gutter, thus causing occasional sparks. While he was thus pushing the loose part of the cable towards the gutter, the men watching him saw him suddenly make a movement as if he had slipped, and in flinging his arms out as if catching at something for support his left hand came in contact with the cable, to which, a witness says, "he held on, gave a groan, and swung around so that his neck or jaw came right across the guy." With some difficulty the men removed contact of the body with the cable, but death was conceded to have been instantaneous, and the result of an electric shock. This action was brought for the purpose of recovering damages, on the theory that respondent was negligent in erecting and operating the derrick in a public street at a place contiguous to electric wires where persons having occasion to use the highway might come in contact with it. Respondent interposed the defense that it was not in charge of the derrick at the time of the accident, and that it was erected and operated by a firm of independent contractors, and that the deceased was guilty of contributory negligence. At the close of the evidence the court directed a verdict for respondent, and from an order denying plaintiff's motion for a new trial plaintiff appealed.

The order must be reversed, unless it conclusively appears that the work was done by independent contractors, and the relation

of *respondeat superior* did not exist, or that deceased was guilty of contributory negligence. It was gross negligence to place the derrick in the public street with its metal cables contiguous to the electric wires, and to operate the same in lifting and swinging heavy iron beams so that contact was made in the manner stated. The inquiry is whether respondent was itself in charge of the work, or whether it had been unrestrictedly delegated to Winblad & Bruce. In the case of *Rait v. Carpet Co.*, 66 Minn. 76, 68 N. W. 729, the following language was used:

"In every case the decisive question in determining whether the doctrine of *respondeat superior* applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong? If he had, he is liable. On this question the contract under which the work was done must speak conclusively; in every case reference being had, of course, to surrounding circumstances."

And under the circumstances of the case it was left to the jury to determine whether the defendant surrendered all control over the manner of performing the work there under consideration. In *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45, the rule was declared as follows:

"Where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is responsible for his acts and omissions within the scope of his authority."

In the case of *Whitson v. Ames*, 68 Minn. 23, 70 N. W. 793, it was said:

"The decisive test in determining whether the doctrine of *respondeat superior* applies is whether the defendant had, under the contract of employment, the right to control in the given particular the conduct of the person doing the wrong."

In *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957, a written contract was construed, and held to show conclusively that the person in charge of the work was an independent contractor; but in that case that entire question was submitted upon the terms of the contract itself. In *Aldritt v. Manufacturing Co.* (Minn.),

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88 N. W. 741, the rule is affirmed as stated in *Rait v. Carpet Co.*, *supra*, in the following language:

"The question whether the doctrine of *respondent superior* applies to any particular case depends upon the question whether the original contractor had control of and the right to direct the subcontractor as to time, place, and manner of performing the work, and this question must be determined from the contract between the parties in the light of surrounding circumstances."

We think the contract, on its face, clearly indicates that respondent did not, in any respect, retain control of the work as to the method, time, or place of its execution, but only as to the result accomplished, viz., that it should be in accordance with the specifications. But from a consideration of all the evidence surrounding the making of the contract we are of the opinion that it does not conclusively appear that the true relations of the parties were defined by the writing. At the time this contract was entered into, the ironwork to be put in place by Winblad & Bruce was lying in a vacant lot on the other side of the street opposite the building in which it was to be placed. For several reasons the best location for the derrick seemed to be in the street in front of the building, because the ironwork was nearer to that point than any other, the street was higher than the ground at the rear of the building, and the alley was hardly wide enough for the required purposes, and, besides, it was used by the brewing company in the daily conduct of its business. It was known to respondent that the street could not be occupied without securing a permit, and Winblad consulted respondent's superintendent in reference thereto. The contract provided that the men employed by Winblad & Bruce should be placed on the pay rolls of the respondent company, and that all tools and appliances were to be furnished by it, and the derrick was delivered in the street by respondent. The construction of the ornamental ironwork respondent reserved to itself, and on one occasion superintendent had put in place certain iron plates, which was part of the work of Winblad & Bruce. It appears that Mr. Winblad had been a regular employe of respondent for about 16 years, that he was accustomed to act as foreman of this kind of work, and had on

several occasions during that period taken similar contracts to the one under consideration. Under all of these circumstances we do not think it appears conclusively, as a matter of law, that respondent did not reserve the right of supervision as to time, place, and method of putting up the structural iron, and whether it did not in fact exercise supervision, to some extent, as to the use of the derrick, and its location with reference to the electric wires. If respondent did exercise such supervision, or if the contract was not intended to express the true relation between the parties in respect to the control or superintendence of the work, then Winblad & Bruce were not independent contractors as defined by the decisions of this court. The case of *Aldritt v. Manufacturing Co.*, *supra*, involved a similar contract to the one under consideration, but the facts in that case were essentially different, and the decision rested upon the ground that the legal status of the parties was determined by the contract itself.

But respondent contends that the record conclusively shows that the deceased came to his death by reason of his own carelessness. The argument to this effect is based upon the fact that he had some experience as an electrician; that he knew contact existed between the derrick cable and the electric wire; that other people had received shocks by touching the cables, and that he was fully warned of the danger, so that his attempt to push the cable back towards the gutter was in a spirit of bravado or criminal carelessness, and not in the exercise of any duty devolving upon him. A close examination of the evidence makes it by no means certain that the deceased was not in the exercise of reasonable care, or that he was not acting in a commendable manner in attempting to move the cable to a less dangerous location. In the first place, his experience as an electrician was limited to the running of an ordinary dynamo. For some reason he assumed that it was one of the secondary wires, charged with 108 or 110 volts, which was in contact with the derrick. It does not appear conclusively that he was negligent in not knowing that it was the primary wire instead of the secondary. If he had been thoroughly familiar with the construction of the electric system, he would have known that

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the cable was in contact with the primary wire, and that the danger was greater; but he assumed that conditions were different, and that the cables were charged with 108 or 110 volts, which, it appears from the evidence, could not be fatal. When some one dared him to touch the cable, he refused upon the ground that his shoes were wet, but remarked that it would not be dangerous, which tended to show precaution upon his part. It is true he had been informed that the electric company had been notified of the condition, but there is no evidence as to what time they were expected to make repairs, and that fact alone is not sufficient to warrant the conclusion that the deceased was simply playing with an instrument of death. It is urged that there was no duty resting upon him to go into the street and interfere with the cable, and that by so doing he assumed the risk, and was alone responsible for the result. True, he was not, in the ordinary sense, a traveler along the public highway at that time, for it may be said that he was attracted to the place by the fact that the derrick had become charged with electricity; but he had a right to be in the street, not only as a public traveler, but also for the purpose of observing what was going on; and, if a traveler would have the right to stop and remove from the highway a nuisance which he conceived to be dangerous to other travelers, then the deceased had a similar right to remove a dangerous instrument which came under his observation, although he was attracted to the place by the very fact of its existence. In the case of *Dillon v. Light Co.*, 179 Pa. 482, 36 Atl. 164, it was held that a police officer was justified in attempting to remove a live electric wire from the public street with his mace. The decision does not necessarily rest upon the fact that he was a public officer whose particular business it was to remove such dangerous appliances. If a patrolman would be justified in so doing, then any person, with reasonable care and caution, may do the same thing. In the case of *Bourget v. City of Cambridge*, 156 Mass. 391, 31 N. E. 390, 16 L. R. A. 605, it was held that one who was traveling in the highway was justified in attempting to remove a loose telephone wire; and, while the opinion in that case discusses the question from the standpoint

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of a traveler, it is clearly stated that the attempt to remove the wire was justified, in that it did not appear to be an intermeddling by a volunteer. In *Light Co. v. Orr*, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30, it was held to be a question for the jury whether a boy, who had been warned, was guilty of contributory negligence in picking up a live wire that was lying across the street. The case should have been submitted to the jury.

Order reversed, and a new trial directed.

KENNEALLY V. WESTCHESTER ELECTRIC RAILWAY CO.

New York; Appellate Division of Supreme Court, Second Department.

1. DUTY AS TO INJURY TO EMPLOYEE OF CONTRACTOR.—The plaintiff was employed by a contractor who had entered into a contract to paint the supporting poles of the defendant's trolley system. While engaged in sandpapering one of such poles he came in contact with an electric feed wire and was severely injured. It was held that the measure of the defendant's obligation was to use reasonable care under such circumstances to protect the workman against injury.
2. NEGLIGENCE; EVIDENCE.—The trial court held that, under the complaint, the negligence of the defendant must be based upon the defective construction of the feed wire in the first instance; and under this ruling the plaintiff was required to establish that the alleged defective insulation of the wire existed at the time it was placed upon the pole as a part of the original construction. The jury passed upon this question and decided that it was originally defective. It was held that the evidence was sufficient to justify this finding.
3. CHARGE TO JURY.—It is not error for the court to refuse to charge that "If the jury is in doubt, if the evidence is equal on both sides, the verdict shall be for the defendant." The mere existence of a reasonable doubt in the minds of jurors in a civil case does not require them to find for the defendant.

Appeal by defendant from judgment for plaintiff, and from an order denying a new trial. Reported 1 St. Ry. 639, 86 App. Div. (N. Y.) 293, 83 N. Y. Supp. 823; decided July 24, 1903.

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Bayard H. Ames (*Theodore Silkman* and *Arthur Ofner*, on the brief), for appellant.

Michael J. Tierney (*John J. Crennan*, on the brief), for respondent.

Opinion by WILLARD BARTLETT, J.:

The plaintiff has recovered a verdict of \$5,000 damages for severe injuries to his arm, caused by coming in contact with a feed wire upon the defendant's trolley system while engaged in sandpapering one of the supporting poles preparatory to painting the same. The plaintiff was employed by a contractor, who had entered into a contract with the defendant to paint the supporting poles. The measure of the defendant's obligation to a workman under these circumstances was to use reasonable care for his protection against injury. *Wells v. Brooklyn Heights R. Co.*, 67 App. Div. (N. Y.) 212, and cases there cited. The theory of the plaintiff's case was that the accident was due to the defective insulation of the feed wire at a point a short distance from the supporting pole, where his elbow came in contact with it; and, in view of the language of the complaint, the trial court held that no negligence could be predicated upon any failure properly to maintain and inspect the feed wire after it was put up, but that the defendant's failure of duty, if made out at all, must be based upon defective construction in the first instance. In this view the plaintiff was required to establish that the alleged defective insulation of the feed wire, if it existed in fact, was a condition existing at the time the wire was placed upon the pole as a part of the original construction. The jury were instructed to pass specifically upon this question, and answered it in the affirmative. The defendant now insists that there was no evidence sufficient to sustain an adverse finding in this respect.

There was proof in the case which would authorize a finding that the insulating covering of the feed wire was lacking at the point where the plaintiff claims to have received his injury; but it is conceded that the wire had been in place about a year, and the appel-

lant contends that evidence showing that the insulation was defective at the time of the accident did not justify the inference that the defect existed at the time of the original construction; inasmuch as there was proof that the action of the wind, causing the wires to sway, had a tendency to wear away the covering material at certain points. I think, however, that such inference might fairly be based upon the testimony offered in behalf of the defendant itself. One of the defendant's witnesses, a lineman named Lafayette R. Baut, testified that there had been no change in the feed wire or the construction at the pole where this accident occurred since the occurrence of the accident down to the time of the trial. The feed wire, he said, was in the same condition, exactly the same as it was in 1899, when he examined it immediately after the accident. The trial took place on October 14, 1902. If the condition of the pole and wire had remained unchanged from July 22, 1899, the day when the accident occurred, to October 14, 1902, the day of the trial, the jury might certainly infer that it remained unchanged from the time it was put up, a year previous to the day of the accident, up to the time of the accident.

It is not necessary to discuss the point made in regard to the alleged contributory negligence of the plaintiff, or his assumption of the risks involved in the employment, further than to say that the proof on these branches of the case not only justified, but required, the submission of both issues to the jury.

At the close of the charge, just before the jury went out, defendant's counsel requested the court to charge as follows: "If the jury is in doubt, if the evidence is equal on both sides, the verdict shall be for the defendant." The learned trial judge refused to charge this proposition, and the defendant's counsel excepted. The refusal was not error. The request involved two propositions: (1) That, if the jury were in doubt, the verdict should be for the defendant; and (2) that, if the evidence was equal on both sides, the verdict should be for the defendant. The first of these propositions was incorrect. The mere existence, even, of a reasonable doubt in the minds of jurors in a civil case, does not require them to find for the defendant. The second proposition—that, if the evidence was equal on,

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both sides, the verdict should be for the defendant—was correct, but the trial court was not bound to give that instruction, coupled as it was with the previous erroneous proposition of law. He had already charged the jury fully in regard to the burden which the law imposed upon the plaintiff to establish his case by a preponderance of evidence, and this, under the circumstances, was sufficient. The judgment should be affirmed.

Judgment and order unanimously affirmed, with costs.

All concur.

Duty of street railway company as to use of electrical wires.—A trolley wire, as used by a street railway company, is charged with an agency of exceeding danger to life, and is capable of communicating such deadly quality to any wire or conductor of electricity that may come in contact with it. When a corporation is authorized to use such an agency in the public streets, the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own employees. *McAdam v. Central Ry. & Elec. Co.*, 67 Conn. 445, 35 Atl. 341, 6 Am. Electl. Cas. 348.

Injury to employee of another company by feed wire of electric railway company.—In the case of *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798, 6 Am. Electl. Cas. 271, the facts were somewhat similar to those of the principal case. The plaintiff's intestate was an employee of a telephone company, and was killed by a current of electricity emanating from a feed wire used by the electric railway company which came in contact with a wire belonging to the employer of such intestate. The court in its opinion says: "The railway company employed in the conduct of its business a subtle, dangerous, and death-dealing agency. It consisted of a highly potential electric current, which traversed wires stretched upon poles, and running through the city of Atlanta and its suburbs. These wires were liable, upon coming in contact with other wires belonging to the telephone company or electric light company, and, perhaps, other corporations, to cause injury or death to employees of these other companies while engaged in performing their duties as linemen. Under these circumstances, it is to all minds a clear proposition that the railway company was bound to exercise at least ordinary diligence, not only to prevent contacts from which the above-mentioned consequences might reasonably be expected to ensue, but also to discover and take measures to prevent a continuance of such contacts, even when occasioned by the negligence of any other persons. To hold otherwise would be to allow this company to maintain its deadly

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agency with no responsibility whatever for consequences which, in the natural course of things, might in all probability occur. Those who employ, in the prosecution of their business, a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others, as the emergency would reasonably seem to require."

Application of maxim *res ipsa loquitur*.—In the case of *Clarke v. Nassau Elec. R. Co.*, 9 App. Div. (N. Y.) 54, 41 N. Y. Supp. 78, it was said: "The fact that the defendant brought electricity into the street for use as a motive power, and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable." See, also, in this connection *Dwyer v. Buffalo General Elec. Co.*, 20 App. Div. (N. Y.) 124, 46 N. Y. Supp. 874. As to the effect of this doctrine upon liability of an electric company for injury to its employees, see *Lincoln St. R. Co. v. Coe*, 48 Nebr. 807, 67 N. W. 740, 6 Am. Electl. Cas. 352; *Kraatz v. Brush Elec. Light Co.*, 82 Mich. 457, 46 N. W. 787, 3 Am. Electl. Cas. 491.

Injury to trespasser.—One who leaves the street and climbs a pole supporting wires, without permission from or notice to the company whose system he has thus entered upon, and is injured by reason of the contact of one company's wire with the feed wire of another company, can recover from neither. *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203, 4 Am. Electl. Cas. 378. In the case of *Freeman v. Brooklyn Heights R. Co.*, 54 App. Div. (N. Y.) 596, 66 N. Y. Supp. 1052, it appeared that the injury was occasioned to a boy who had climbed upon the girder of an archbridge, along which the defendant's trolley wire was strung, and had caught hold of a guard wire which in some manner had become charged with electricity. The wires were so strung that they were entirely out of reach of persons using the street and sidewalk in the ordinary manner, and it was only when the plaintiff had gone out of his way and had climbed into a position of danger independently of the wires, that he was exposed to contact with them. The court held that the defendant was not bound to anticipate this danger, and especially so, as the guard wires which the plaintiff caught hold of, was not designed for the purpose of carrying a current of electricity, but was for the purpose of protecting the wire which did carry the current, and the usual precautions by the way of inspection had been taken, to see that there was no leakage of the current from the wire to the guard wire.

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HART V. ALLEGHENY COUNTY LIGHT CO.

Pennsylvania; Supreme Court.

1. INJURY TO ELECTRIC LIGHT INSPECTOR BY CONTACT WITH ELECTRIC LIGHT WIRE AND TELEPHONE WIRE; CONTRIBUTORY NEGLIGENCE.—In an action by an electric light inspector against a telephone company and an electric light company it appeared that such inspector had been in the employ of the defendant electric light company for several years; that he was an experienced man and had been accustomed to climb poles upon which both electric wires and telephone wires were placed. While upon a pole upon which an electric light and telephone wire were connected he was injured by placing one hand upon the telephone wire and the other upon the electric light wire. It was his special duty as inspector to see that the electric light wires were clear at night and to adjust any difficulties interfering with the lights. He had been provided with rubber gloves, but was not using them when the injury was received. It was held that the plaintiff was guilty of contributory negligence precluding recovery.

Appeal by defendant, Allegheny County Light Co., from a judgment rendered against it in favor of the plaintiff. Decided January 6, 1902; reported 201 Pa. St. 234, 50 Atl. 1010.

Knox & Reed and *J. H. Beal*, for appellant.

W. A. Hudson and *Geo. A. Sturgeon*, for appellee.

Opinion by POTTER, J.:

This action was brought against two defendants as joint tortfeasors. The evidence failed to show any concert of action, or any joint trespass, by the defendants, and under the principle of *Wiest v. Traction Co.*, 200 Pa. 148, 49 Atl. 891, a separate recovery should not have been allowed against one defendant. The point should, however, have been brought to the attention of the court at the trial.

But, aside from this question, it clearly appears from the evidence that the injury for which recovery is here sought was caused by the act of the plaintiff in placing one hand upon a telephone wire, and the other upon or in contact with an electric light wire, both wires being upon the same pole, which was the property of the

electric light company. The plaintiff was an inspector, and had been employed as such by the electric light company for several years. He was an experienced man, and had been accustomed to climbing poles upon which both electric wires and telephone wires were placed. The special duty for which he was employed was to look after the lights at night, and to see that the wires were clear, and to adjust any difficulties that prevented the proper operation of the lights. It is therefore apparent that the plaintiff, above all others, was the one whose business it was to discover anything wrong with the wires. The defendant company could only be apprised of a difficulty with its wires through the report of the plaintiff, or some other inspector employed for that purpose. The plaintiff was familiar, or at least should have been, with the condition of the electric light wires, and their situation upon the poles with relation to buildings, trees and other wires.

Electric light wires are, of course, always dangerous to handle. There is always a possibility of injury from them alone, or in connection with other wires. The telephone wire complained of in this instance was not, as stated in the plaintiff's declaration, a "grounded or live wire," but was an ordinary wire leading from the pole to an office near by. Of course, there was connection with the earth at some point on the line, but it is apparent from the testimony that the injury was caused, not by any current which was carried by the telephone wire, but by reason of the fact that when the plaintiff came in contact with the light wire in one hand, and with the telephone wire in the other, his body formed a short circuit between the two wires, which resulted in his receiving a shock from the heavily charged electric light wire, causing him to fall.

He had been provided with rubber gloves for the express purpose of protecting himself against an injury of this character. If he had made use of these rubber gloves upon the night in question, he would have been safe. Whether it be put upon the ground of the knowledge which the plaintiff had, or should have had, or the relative position of the two wires, or whether it be based upon his

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carelessness in failing to protect himself at the time of the accident by the use of the rubber gloves provided for that purpose, in either case the inference is unavoidable that, without the contributory negligence of the plaintiff, the accident could not have occurred.

The first specification of error is to the refusal of the appellant's first point, which prayed for binding instructions in favor of the defendant. This assignment is sustained, and the judgment is reversed.

JACKSON & SUBURBAN STREET RAILROAD CO. V. SIMMONS.

Tennessee; Supreme Court.

1. **USE OF INSTRUMENTS TO DETECT DEFECTS.**—The plaintiff's intestate, who was a lineman in the employ of a telephone company, was fatally injured while attempting to repair a telephone wire, by coming in contact with a live wire of a street car company attached to one of its poles which the decedent had ascended for the purpose of making such repairs. The decedent was furnished with a magneto bell and test set in order to enable him to ascertain the presence of an electric current in any wire, but he failed to have them with him on this occasion. It was held that the question as to whether these instruments were designed to test insulators and defects therein was a question for the jury.
2. **PRESUMPTION AS TO PROPER INSULATION.**—An instruction to the effect that if the decedent had no knowledge that the wires of the street railroad company at the point of contact were not properly insulated and reasonably safe, then he had a right to presume that they were properly and safely insulated unless the want of insulation or the defective insulation was plainly apparent to him in the exercise of ordinary and reasonable care, is erroneous because it relieves the employee of his duty to exercise active diligence for his own safety in an occupation peculiarly hazardous.

Error brought by defendant from judgment in favor of plaintiff.
Decided June 22, 1901; reported 107 Tenn. 392, 64 S. W. 705.

C. G. Bond and Hays & Biggs, for plaintiffs in error.

R. F. Sprigins and Bullock & Timberlake, for defendant in error.

Opinion by McALISTER, J.:

Mrs. Simmons recovered a joint judgment against the telephone and street railroad companies for the sum of \$2,500 for the wrongful killing of her husband, R. P. Simmons. Both companies appealed, and numerous errors are assigned.

[Matter omitted pertains to question of practice.]

The gravamen of the action as laid in the declaration is that plaintiff's intestate, R. P. Simmons, at the time of his death, was in the employment of the telephone company in the capacity of a lineman, and was killed by coming in contact with a live wire of the street car company, attached to one of its poles, which Simmons had ascended for the purpose of making repairs for the telephone company. It is alleged that prior to that time the street car company and the telephone company had entered into a contract, parol or written, by which it was mutually agreed that either company might use the poles of the other in case of necessity or expediency. Again, it is alleged that the street railroad company, by permitting the telephone company to string its wires on the pole in question, made the latter company a licensee, whereby the street railroad company owed a duty to the telephone company and its employees to keep its wires attached to said poles properly insulated. Again, it is alleged that the street railroad company, in carrying on its business and maintaining its system of wires in a public thoroughfare, where the poles and wires of other electrical companies were maintained, owed a duty to the employees of the other electrical companies to keep its wires attached to said poles safely insulated. It is further charged that the defendant telephone company, by stringing one of its wires to said pole for the purpose of making a return circuit, made said pole part of its appliances and premises, and defendant telephone company, in not providing safe appliances, and inviting deceased to an unsafe and dangerous place to work, is liable. It is further charged that both companies knew, or ought to have known, that said wire was not insulated, and that it was charged with a deadly current of electricity. The facts disclosed in the record tend to show that the deceased at the time of the accident was in the service of the tele-

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phone company as lineman and inspector. His duties were of a general nature; that is to say, they were not specifically defined, but the deceased was expected to perform any duties in the line of telephone business that might be demanded of him. On the 17th of September, 1897, a street car had become derailed, and the trolley pole in some way came in contact with the guy wire attached to a pole of the car company, thereby turning the current of electricity from the trolley wire to the guy wire, and, pushing the guy wire up, caused it to come in contact with the lead cable incasing the telephone wires, and burning a hole in the cable. When the derailed car was placed back on the track, the original *status quo* was restored, and there was no further communication between the trolley and guy wires. The telephone company was apprised of the accident, and directed the deceased to proceed to the place, and ascertain the cause of the trouble. The deceased, after an examination of the premises, and without special directions from his superior officers, mounted a pole belonging to the street car company, ostensibly to raise the lead cable of the telephone company, which was then sagging down, and attach it to a bracket affixed to the street car company's pole, and while thus engaged Simmons was killed by coming in contact with one of the live span wires of the street car company. The gravamen of the action against the street car company is that it was negligent in only using a single insulator placed at the connection of the span wire with the trolley wire, and which insulator was itself defective, and out of repair; and negligently failing to place a second insulator at some proper and convenient point between the trolley wire and said pole. There is proof tending to show that no inspection had been made by the street car company from the time it began operating, April 30, 1897, up to the time of the accident, to see if its said insulators were in good condition. It was insisted that the street car company had at its power house what is termed a "circuit breaker," and that no other test or inspection of insulators was necessary. It is further shown that the street car system had only been in operation in Jackson for about four months; that it was equipped with the best and most modern appliances; that the span wires were at-

tached to the trolley wire by the bell-hanger insulator, which was the latest and most effective appliance for preventing the electrical current from escaping from the trolley wire to the span wire. It is also shown that company had furnished Simmons with a magneto bell and test set in order to enable him to ascertain the presence of an electrical current in any wire, but that he failed to have them with him on this occasion. Whether these instruments were useful only in discovering electrical disturbances on the line, and were not designed to test the insulators and defects therein or their location, was a question addressed to the superior wisdom of the jury. It is said, however, that a common and very reliable test of the voltage of the wire is to brush it lightly with the hand, or with an old piece of iron, and that this test was usually applied by linemen. There is evidence tending to show that when Simmons first mounted the pole he touched the wire that afterwards caused his death, but at that time no serious result was experienced. It is said that a defective insulator acts perfectly at one moment and the next moment will permit a fatal current of electricity to pass over the wire. It is insisted on behalf of defendant in error that the deceased did not know, until he received the shock, that the wire which produced his death was dangerous. On the other hand, there is proof tending to show that about 30 days prior to the accident the deceased was engaged with others in running a wire of the telephone company along by said pole where deceased was killed, and he received a shock at that time from one of the wires attached to that pole. It is also in evidence that on the day of the accident deceased stated that the wires were hot, and he was warned by one or two others not to ascend the pole. This is a substantial statement of the case as made in the pleadings and proof.

[Matter omitted pertains to alleged misconduct of jury.]

The third assignment of error is that the court instructed the jury that "if Simmons (the deceased) had no knowledge, either actual or from information, that the span wires of the street railroad company at the point in controversy, and strung to this pole, were not properly insulated, and reasonably safe, then he had a

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right to presume they were properly and safely insulated, unless the want of insulation at all or defective insulation was so open and obvious that he ought, in the exercise of ordinary and reasonable care and caution, to have so known." This charge, we think, erroneous, for it relieves the employee of the duty to exercise active diligence for his own safety in an occupation peculiarly hazardous, and where the employee has the better opportunity of discovering and avoiding the danger. In the case of *Telephone Co. v. Loomis*, 87 Tenn. 504, 11 S. W. 356, it was held by this court, viz.:

"A charge to the effect that a servant may assume that a telephone pole which he is required to climb in the due course of his employment is safe and suitable for that purpose is erroneous in a suit brought by the servant for injuries caused by the breaking of the pole, in that it relieves him from the exercise of ordinary care for his own safety, and decides that he was not the company's inspector of poles,—a disputed fact in the case."

In the case at bar the proof shows that it was the duty of Simmons, as a lineman, to dig holes, raise poles, put cross-arms thereon and steps, string wires, put on guy wires, and clear line troubles; and as an inspector his duties were the foregoing, together with clearing trouble in instruments, putting in new telephones, collecting when needed, and making himself generally useful. The record further shows that Simmons was an experienced man in his line of business; that he had been manager of the telephone company at Humboldt, and employed in the service at Nashville, where intricate systems of telephones and electric car wires cross each other and are maintained. It was necessarily a part of his duty to inspect and test the wires about which he expected to work. The case of *Anderson v. Telegraph Co.* (Wash.), 7 Am. Electl. Cas. 725, 53 Pac. 657, 41 L. R. A. 410, was a case where a servant of the telephone company brought an action against the telephone company and the street railway company jointly for personal injuries. At the time of the accident the plaintiff was a lineman in the employ of the telephone company. The two defendants used in common a pole,—the telephone company for holding up its wires, and the street railroad company fastening to said pole a span wire or guy wire running from the trolley wire. The plaintiff, a line-

man, ascended said pole for the purpose of stringing a wire on it, and while on the pole came in contact with the span wire belonging to the street railway company, and sustained from the shock serious personal injuries. It was held that the failure of the lineman to test the insulators would preclude any recovery. *Bergin v. Telephone Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192, was a case where a telephone company, and an electric railroad company used the same pole for their wires, and the court held that the law did not absolutely require the telephone company, as between it and its linemen, to test and inspect guy wires and circuit breakers put in by such railroad company to discover whether they were in a safe condition, but whether the employer or employee should discharge such duty depended on the facts of the particular case.

"Linemen," said the court, "are employed by the telephone company, among other things, for the purpose of doing work which is dangerous by reason of the possible contact of the telephone wires with highly-charged wires of the street railway or other companies. The linemen are to do their own testing on such work. The telephone company has no other men to do the testing than the linemen, as the latter knew. There was nothing to prevent Delaney (who was the plaintiff in the case) from testing the guy wire, and the linemen on this job were furnished with all the tools, appliances, and wires with which to test wires of the electric street railway."

The case of *Hector v. Light Co.* (Mass.), 5 Am. Electl. Cas. 300, 37 N. E. 773, 25 L. R. A. 554, shows the plaintiff was a lineman of the telephone company, and went upon the roof of the building called the "Youth's Companion Building" for the purpose of affixing a telephone wire to a standard erected upon the roof of that building. He was injured, while on the roof, by his hand coming in contact with a wire belonging to the defendant, the electric light company, through which an alternating electric light current was being transmitted. The plaintiff had a long experience with electrical apparatus, was familiar with all kinds of electrical wires, and the proper methods of handling them, and the dangers attendant upon the business. It was admitted that the defendant was transmitting through these alternating wires an electric current of a thousand volts, which was dangerous under certain conditions. But it was contended that to make such a current dangerous the

person touching a wire must be "grounded," as it is called,—that is, be connected with the earth by substances that are conductors of electricity,—while the other wire of the circuit must be grounded at the same time. The claim of the plaintiff was, in effect, that the alternating electric light wires were not properly insulated. The court held that the electric light company, on the evidence, owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injury.

The sixth assignment of error, in which objection is made to the charge of the court on the theory of a sudden exigency or emergency of the business, is also sustained. This is not the case of an employee ordered by the master, upon a sudden emergency, into a place of danger. There is no evidence that deceased was ordered to ascend this pole and raise the sagging lead cable, but this method of accomplishing the work was chosen by the deceased himself, rather than ascend a pole belonging to the telephone company, which stood 30 feet north, and which deceased could have ascended, and thereby avoided any contact with the wires of the street car company.

The trial court was also in error in refusing the fourth and fifth instructions submitted by defendants, and embodied in the tenth and eleventh assignments of error on the brief of the telephone company. These supplemental requests embodied the theory of the defendant companies, and should have been given in charge.

For the errors indicated, the judgment is reversed, and the cause remanded.

RUCKER V. SHERMAN OIL & COTTON CO.

Texas; Court of Civil Appeals.

1. INJURY TO LINEMAN OF ELECTRIC COMPANY BY CONTACT WITH UNINSULATED WIRE OF ANOTHER COMPANY; EVIDENCE.—A lineman in the employ of an electric company, while engaged in aiding in the erection of a pole, found it necessary to go upon a corrugated iron awning. While in such position he came in contact with an uninsulated wire of the defendant stretched above such awning, and received an electric shock causing his death. In an action to recover damages therefor evidence is admissible showing that the awning had been frequently used by persons going on the roof thereof to repair and paint the awning, to paint the wall of the building and to put in telephone connections. Such evidence has a direct bearing upon the negligence of the defendant in failing to use necessary care in providing proper insulation for its wires at places where others may go, either for work, business or pleasure.

Appeal by plaintiff from judgment for defendant. Decided May 14, 1902; reported 29 Tex. Civ. App. 418, 68 S. W. 818.

Hazelwood, Smith & Tolbert and Galloway & Templeton, for appellants.

Head & Dillard, A. L. Beaty and Moseley & Smith, for appellees.

Opinion by FLY, J.:

On September 22, 1900, W. S. Rucker, the husband of Sadie Rucker, father of Edward Rucker, a minor, and son of M. C. Rucker, was killed by coming in contact with an uninsulated wire charged with electricity, belonging to the Sherman Oil & Cotton Company, while at work on an awning in discharge of his duties as a lineman in the employ of the Electric Installation Company, which had a contract for the erection of poles and wires and the installing of an electric plant for the Denison & Sherman Railway Company. Appellants sued the companies above named, who are appellees herein, to recover damages resulting from the death of W. S. Rucker. The court, after hearing the testimony, instructed the jury to return a verdict for appellees.

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There was no evidence of negligence on the part of the installation company and the railway company. The evidence disclosed that the uninsulated wires of the Sherman Oil & Cotton Company were stretched above an awning of a business house at such a distance that deceased, while engaged in holding a pole so as to guide it through a hole in the awning as it was being placed in the ground by his fellow laborers, came in contact with a wire heavily charged with electricity, and was instantly killed. The awning on which deceased was killed was covered with corrugated iron, and was attached to the storehouse as a protection against sun and rain to those on the sidewalk. Appellants offered to prove, however, that the awning "had been frequently used by persons going on the roof to repair and paint the awning, to paint the walls of the building, and to put in telephone connections," but the testimony was rejected by the court. Under the decision in the case of *Power Co. v. Lefevre*, 7 Am. Electl. Cas. 598, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898, the court did not err in instructing a verdict for appellees under the facts admitted in evidence, and the question is presented as to whether the admission of the rejected evidence would have made a case that should have been presented to the jury for determination. In the *Lafevre case* there was no proof that the "awning was ever used as a place of resort, or for any purpose whatever by persons going on top of it," and the failure to make such proof seems to be the turning point in the case; and the clear inference from the repeated declaration that such evidence was lacking is that, had such evidence been introduced, the decision would have been different. With the proof before the jury that was rejected by the court a question of fact, as to whether the oil and cotton company might have reasonably foreseen that some person might come in contact with the exposed wires, was raised, and the case should have gone to the jury. All the uses that were made of the awning, except those made of it by trespassing boys, were ones that might have been reasonably anticipated; and, if the company owning the wires knew or should have known that the awning was put to such uses, it would be liable for damages caused to any one lawfully on the

awning, whether he was using it for the purposes that the others did or not. The fact that persons went on the awning for certain lawful purposes put the oil and cotton company on notice that others might go there for other lawful purposes. "A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business or pleasure, to prevent injury. Joyce, *Electric Law*, sec. 445, and authorities cited; *Overall v. Light Co.* (Ky.), 7 Am. Electl. Cas. 521, 47 S. W. 443; *McLaughlin v. Light Co.* (Ky.), 6 Am. Electl. Cas. 255, 37 S. W. 856, 34 L. R. A. 812; *Schweitzer's Adm'r v. Electric Co.* (Ky.), 7 Am. Electl. Cas. 571, 52 S. W. 830; *Perham v. Electric Co.* (Or.), 7 Am. Electl. Cas. 487, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. There is nothing in the evidence that indicates that deceased was a trespasser on the awning, but, on the other hand, it may be inferred that he was there with the implied permission of the owner, and engaged in the lawful prosecution of his work. As said by the Supreme Court of Louisiana in *Clements v. Electric Light Co.*, 4 Am. Electl. Cas. 481, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, if the wire "passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean, it was the duty of the company, independent of any statutory regulation, to see that their lines were safe." The fact that workmen had frequently gone on the awning to make repairs, and that telephone employees had gone there to make connections, was proof that it was a place where people went for business, and raised the question of negligence on the part of appellee, that should have been submitted to the jury. Appellee cannot justify the peremptory instruction on the ground that it did not know that the persons in question had gone upon the awning; and neither is the position tenable that, while it may have known that painters and telephone employees may have gone there, it had no reason to anticipate that a lineman would go there. The question of knowl-

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edge was one that might be inferred from the fact that the employees went there, and, if it owed a duty to them, it owed a duty to any one there in the lawful prosecution of his business.

The judgment is affirmed as to the Electric Installation Company and the Denison & Sherman Railway Company, but is reversed as to the Sherman Oil & Cotton Company, and the cause remanded for another trial.

PART VIII.

**RIGHTS OF PATRONS OF TELEPHONE, TELEGRAPH
AND ELECTRIC LIGHT COMPANIES.**

(845)

PATRONS OF TELEPHONE COMPANIES.

HABER, BLUM, BLOCH HAT Co. v. SOUTHERN BELL TELEPHONE & TELEGRAPH Co.

Georgia; Supreme Court.

1. **PLEADING**—A special demurrer, which is founded on the terms of a contract neither set out in the petition nor made in any way a part thereof, will be considered.
2. **REFUSAL TO TELEPHONE SUBSCRIBER OF LONG DISTANCE CONNECTION.**—Where a subscriber to a telephone exchange at one place desired to communicate with his regular counsel in another place, was refused the long-distance connection, contrary to an alleged contract, and avers that in consequence of such refusal he (the said subscriber) paid unnecessarily and unjustly a delinquent employee \$175 to get rid of him and to recover from him certain property intrusted to him, and to avoid a threatened lawsuit, it not appearing that such absent counsel could have controlled such delinquent employee, such payment cannot be recovered as actual or special damages. This view is re-enforced, if it needs re-enforcement, by the averment that this sum was unnecessarily paid.
3. **EXEMPLARY DAMAGES.**—Nor do we think that the refusal by a telephone company to a subscriber of a long-distance connection, without aggravating circumstances, would entitle a party to exemplary or punitive damages.
4. **DAMAGES FOR BREACH OF CONTRACT.**—While the breach of contract would entitle the party injured to nominal damages at least (Civ. Code 1895, sec. 3801), this principle of law does not apply in a case in which only actual and punitive damages are sued for, construing the pleadings most strongly against the pleader.
(Syllabus by the court.)

Error by defendant from judgment for plaintiff. Decided November 3, 1903; reported 118 Ga. 874.

B. J. Dasher and A. L. Dasher, for plaintiff in error.

Roland Ellis, for defendant in error.

TURNER, J.: Judgment affirmed without opinion, all the justices concurring.

ATLANTA STANDARD TEL. CO. v. PORTER.

Georgia; Supreme Court.

1. **CONTRACT FOR USE OF TELEPHONE; INTERRUPTED SERVICE.**—Where a contract between a telephone company and one of its subscribers provided that the latter should pay to the former a specified sum “as an annual rental for exchange services, charges . . . payable in quarterly installments in advance,” and “if the service (should be) interrupted otherwise than by negligence or willful interference of the subscriber, a rebate at the rate” specified for the “rental” should “be made for the time such interruption (continued) after reasonable notice in writing to the company, but no other liability (should) in any case attach to the company,” the subscriber could not escape liability for the stipulated rental, because of bad, improper, or useless service, without first giving to the company notice in writing of an interruption of service.
2. **NOTICE OF INTERRUPTED SERVICE.**—Hence, in a suit by the company against the subscriber for an amount claimed to be due the plaintiff for telephone service, upon the defendant's admitting that he “never gave the company any written notice of interruption of service before this suit was filed,” testimony offered by him tending to show bad, improper, or useless service was inadmissible, when proper objection was made thereto.
(Syllabus by the Court.)

Error by plaintiff from judgment for defendant. Decided February 9, 1903; reported 117 Ga. 124, 43 S. E. 441.

Felder & Rountree and Fuller & Nealon, for plaintiff in error.

R. B. Blackburn, for defendant in error.

Opinion by FISH, J.:

The Atlanta Standard Telephone Company sued T. H. Porter in a justice's court in Fulton county upon an account for \$16.80 for telephone service. In the justice's court the case was appealed to a jury. and there was a verdict for the defendant. The plaintiff presented a petition for *certiorari* to the judge of the Superior Court of the Atlanta circuit, who refused to sanction the same, whereupon the plaintiff sued out a bill of exceptions, alleging error in this ruling of the judge. From the evidence for the defendant, as set forth in the petition for *certiorari*, it appears that the de-

fense set up was failure of consideration. It also appears that the plaintiff introduced a witness who swore that the account sued on was just, due, and unpaid, and a written contract between the parties, wherein the defendant agreed to pay to the plaintiff, "as an annual rental for exchange service charges, the sum of \$36.00, payable in quarterly installments in advance, for a period of five years." This contract contained the following provision:

"If the service is interrupted otherwise than by negligence or willful interference of the subscriber, a rebate at the rate hereinbefore specified shall be made for the time such interruption continues after reasonable notice in writing to the company, but no other liability shall in any case attach to the company."

The decision of the case turns upon the proper construction of this provision. The defendant, who was introduced by the plaintiff, testified that "the telephone was put in and remained in until this suit was filed," and that he "never gave the company any written notice of interruption of service before this suit was filed." The plaintiff objected to certain testimony of the defendant himself, and of witnesses introduced by him, tending to show—to use the language of our learned brother of the Superior Court—"bad or improper or useless service," "upon the ground that it was irrelevant; the defendant having testified that he had not given the plaintiff the written notice of interruption of service required by the contract." This objection, which was repeatedly made as the evidence was offered, was in each instance overruled by the magistrate; and, in the petition for *certiorari*, error was assigned upon each of these rulings. A further assignment of error was "that the verdict was contrary to the law and the evidence, and without evidence to support it." The order of the judge refusing to sanction the petition for *certiorari* was as follows:

"I cannot sanction this writ. The evidence authorized the verdict. The objections to evidence all hinged on the fact that no written notice had been given. The only requirement of notice in the contract is in order to get a rebate if the service is 'interrupted, . . . for the time such interruption continues.' This is entirely different from bad, improper, or useless service."

We think his honor erred in the construction which he placed upon the contract. It will be seen that under the contract the defendant was bound to pay to the plaintiff, for telephone service to be furnished to him by the latter, \$36 annually, in quarterly installments, payable in advance of service rendered by the company; and, if the service should be "interrupted otherwise than by the negligence or willful interference" of the defendant, the plaintiff was bound to "rebate" or refund the "rental" for the time during which such interruption continued after written notice thereof to the telephone company, but "no other liability should in any case attach to the company." So, if the contract were carried out on the part of the defendant, the "rental" for the telephone service which the company contracted to furnish him would at the beginning of each quarter be paid in advance of the rendition of such service, subject to be proportionately rebated or refunded for the time during which the service should, without fault of the defendant, be interrupted, after written notice thereof to the company; and as, by the terms of the contract, the company was, upon the happening of the specified conditions, bound to rebate the rental, and only bound to rebate it upon those conditions, the defendant could not escape liability for the rental without showing interruption of service, continuing after he had notified the company, in writing, of the same. Under this contract, nonliability of the defendant for the rental, and liability of the plaintiff to rebate the same, amount to the same thing; and, as "no other liability should in any case attach to the company," except the liability, under the specified conditions, to rebate the rental, it follows that, except under such conditions, the defendant would be liable for the rental which he contracted to pay. Hence, in order to give the provisions of the contract in reference to an interruption of service a reasonable interpretation, "interrupted" service must be construed to mean not only a total cessation of a service once begun, but any service falling short of service reasonably suited to the purpose intended; for otherwise the subscriber could not claim the right to have money which he had paid in advance for telephone service refunded upon the

ground that the service furnished was so unsatisfactory and defective as to be practically useless, but could only claim such a right when there was a total cessation of service. An interruption of service, within the meaning of this contract, is an interruption of the kind of service contracted for,—that is, of a service reasonably adapted to the purpose intended,—and such a service could be interrupted by being displaced by a “bad, defective, or useless service.” We think the provision of the contract in reference to interrupted service was intended both to secure to the subscriber a reasonably efficient service on the part of the company, and to prevent, on his part, a claim of nonliability for the specified rental, based upon bad and defective service, or a total cessation of service, unless the company was first afforded an opportunity to remedy whatever defects there might be in the service. A portion of the testimony objected to by the plaintiff and admitted by the court was perfectly consistent with an interrupted service, even if, under this contract, interruption of service should be construed to mean only a total cessation of a service once begun; and all of it tended to show an interrupted service, within the meaning of that term as applied to the contract. The defendant having testified that he never gave any written notice of interruption of service to the plaintiff, and the testimony under consideration, when offered, having been objected to upon this ground, it was error to admit it; and the petition for *certiorari*, assigning error upon such ruling, should have been sanctioned by the judge of the Superior Court.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

Irvin v. Rushville Co-operative Telephone Co.

IRVIN V. RUSHVILLE CO-OPERATIVE TELEPHONE CO.

Indiana; Supreme Court.

1. **STATUTE IMPOSING PENALTY FOR FAILURE OF TELEPHONE COMPANY TO SUPPLY TELEPHONE CONNECTIONS.**—Section 5529 of the revised statutes of Indiana (Burns' Rev. St. 1901), provides that telephone companies shall supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and such companies are prohibited thereby from imposing conditions or restrictions upon such applicants that are not imposed impartially upon all persons in like situation; such companies are also prohibited from discriminating against any individual or company engaged in any lawful business, or between individuals or companies in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose. In an action under such a statute for penalties imposed thereby it was held that there could be no recovery unless it be shown that the rule or by-law adopted by the company, under which the plaintiff was shut off from the right to use the facilities of the company, was unreasonable, or that such rule was not impartially applied to all similarly situated.
2. **REASONABLENESS OF BY-LAW OR RULE AS TO PAYMENT OF CLAIMS FOR SERVICES; ENFORCEMENT.**—A rule or by-law adopted by a telephone company that all moneys due the company shall be payable on or before the fifth day of the month succeeding the maturity of the indebtedness, and if not paid on or before such date the service to the delinquent shall be discontinued until the indebtedness is fully paid is not unreasonable. Such a rule or by-law may be enforced against a person claiming that the company is indebted to him.
3. **UNJUST DISCRIMINATION AGAINST PATRONS; ALLEGATION IN PLEADING.**—An allegation in a complaint, for the purpose of showing discrimination, that thirty-five other patrons of the company "were in like situation with the plaintiff" is a mere conclusion; the allegation is not sufficient to show that such other patrons were in default, and, therefore, did not allege sufficient facts to show a discrimination.
4. **PLAINTIFF NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.**—The deprivation of telephone service for failure to comply with a reasonable rule of a telephone company does not deprive a patron of his property without due process of law, since upon payment of the rental up to the time service was denied him he may regain his right to the service.

Appeal by plaintiff from judgment in favor of defendant. Decided December 16, 1903; reported — Ind. —, 69 N. E. 258.

Irvin v. Rushville Co-operative Telephone Co.

S. L. Innis, G. W. Morgan, Conner & Conner, and A. B. Irvin,
for appellant.

Ben L. Smith, Claude Cambern, and Donald L. Smith, for
appellee.

Opinion by GILLETT, C. J.:

Action by appellant in 10 paragraphs to recover 10 penalties of \$100 each, under the provisions of sections 2, 3, Acts 1885, p. 151 (sections 5529, 5512, Burns' Rev. St. 1901). A demurrer was sustained to each of said paragraphs, and there was a final judgment that appellant take nothing by his action, and for costs.

The eleventh paragraph of complaint is of a representative character, and an exhibit of that will therefore sufficiently show what is alleged. Said paragraph, omitting the prayer, is as follows: "That the defendant is an incorporated telephone company, duly incorporated under the laws of the State of Indiana authorizing the incorporation of telephone companies, and that it is now, and has been for more than eight years past, engaged in carrying on a general telephone business in the city of Rushville, Indiana. That said company, at the time of its organization, adopted the plan of allowing patrons who desired telephone service to become stockholders in the company, to purchase and own their own telephones, and to purchase and own their own wires leading from the location of their said telephones over the pole lines of the defendant to its exchange, and to pay a rental at the end of each month of a sum sufficient to pay the operating expenses of said company. That under this arrangement the plaintiff purchased and paid for one share of stock in said company, purchased a first-class telephone, and also paid for a line of wire leading from said telephone, which was and is located on plaintiff's dwelling on North Main street, in said city of Rushville, and within the local limits of said telephone business, to the switch board of the defendant in said city. That on the 20th day of July, 1898, he had said telephone and line in good working order and connected as aforesaid. That he had always complied with the reasonable regulations of said company, and

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that on said 20th day of July, 1898, he called up the exchange of the defendant, and demanded that he be connected with No. 29, which was the line leading from said defendant's switch board to plaintiff's said telephone, which said defendant unlawfully and wrongfully refused to do. That more than two years before the happening of the grievances hereinafter complained of the defendant, by its board of directors, had adopted a rule or by-law which reads as follows, to wit: '13. All moneys due this company or its toll-line connections shall be payable at the office of the secretary on or before the fifth day of the month succeeding the maturity of such indebtedness, and if not paid on or before said date, the service of such delinquent shall be discontinued until such indebtedness is fully paid.' That said rule or by-law was never enforced by the defendant. That the patrons of said company did not pay the tolls, dues and demands that the several patrons of said company owed said company at the office of the secretary of said company in compliance with the provisions of said rule, but, on the contrary, said company allowed said rule to remain unenforced, and at no time has said company enforced the same. That on said 20th day of July, 1898, the defendant was justly indebted to the plaintiff in the sum of \$1.50, and he owed said company on account of rent and tolls the sum of \$1.05, leaving defendant owing him, after deducting said rent and tolls, the sum of \$.45. That long after said telephone service had been refused the plaintiff, as hereinbefore stated, the defendant gave as a reason for refusing said telephone service that the plaintiff had not paid the rent and tolls he owed said company, but at the time said telephone service was refused the defendant gave no reason for refusing said telephone service. That at the time he was refused telephone service, as hereinbefore stated, thirty-five other patrons of the defendant, who were in like situation with the plaintiff, except that the defendant did not owe them, or any of them, any amount, were delinquent and in arrears in the payment of rent and tolls; that each of said thirty-five patrons then owed the defendant, and had been in arrears in the payment of said tolls and rents from and beyond the time of the maturing of the indebtedness of \$1.05

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from the plaintiff to the defendant hereinbefore mentioned. That the defendant did not refuse said thirty-five patrons, or any of them, who were in arrears in the payment of their respective rents and tolls as hereinbefore stated, telephone service, but, on the contrary, continued to render each of said thirty-five delinquent patrons telephone service, though each of said thirty-five patrons remained delinquent and failed to pay what they each owed said company for more than twenty days after the plaintiff had been refused telephone service as aforesaid, though demands had been made upon them for payment of said dues; but plaintiff expressly avers that the defendant unlawfully and wrongfully discriminated against the plaintiff, and refused to render him telephone service, as hereinbefore stated."

On a former appeal of this case, where there had been a recovery on each of the first 10 paragraphs of complaint, which were afterwards dismissed, it was held by the appellate court that said by-law or rule No. 13 was valid, and that appellee was not obliged to yield such provision or incur the statutory penalty in case it could be proved that appellant had a set-off greater than the amount of the delinquent rental. *Rushville Co-operative Telephone Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. Much of the effort of appellant's counsel on this appeal has been to show that the cause of action has been so changed that the decision of the appellate court above referred to is not the law of the case. It is claimed that the present complaint is based on an unlawful discrimination. It is further claimed that the question as to the reasonableness of said by-law or rule was not presented to the appellate court, and that therefore appellant is not bound by its decision upon that point. In the latter insistence counsel impliedly forget the announced theory of their complaint, but we prefer to put our decision on a broader basis. Section 5529, *supra*, is as follows: "Every telephone company with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone companies' [*sic*] business supply all applicants for telephone connection and facilities with such connections and facilities without discrimina-

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tion or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose." The claim is made on behalf of appellant that his complaint states a cause of action within the following words of said statute, "nor shall such companies discriminate against any individual or company engaged in any lawful business." It is not shown by allegation that there has been any discrimination against the business of appellant, and therefore he has not brought himself within the clause of the statute last quoted. Whether he complains of the failure to furnish him connections or facilities, or of the imposing of a condition or restriction upon him that is not imposed impartially upon all persons in like situation, it is evident that, to recover, he must either successfully assail the reasonableness or operation of the by-law or rule, or show that it was not impartially implied to all similarly situated. The statute travels on the assumption that telephone companies may make reasonable rules. Appellant does not allege that the by-law or rule in question was not promulgated, or that he did not know of it, and we incline to the opinion that the complaint states such facts relative to the mutual character of the corporation that it may be said that the provision was in the nature of a legislative act, passed by the corporation for the government of its members, that appellant was bound to take notice of. *Mason v. Mason*, 160 Ind. 191, 65 N. E. 685, and cases there cited; Thompson, Com. Law Corp., sec. 939. It is further to be noted that the complaint is so drawn that it is open to inference that appellee had warned appellant before the service was denied him that it would enforce the by-law or rule against him as a consequence of his refusal of payment, and it may also

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be inferred that he was denied service for the reason that he had not complied with the regulation mentioned. The allegation of the complaint that at no time has the company enforced the rule was evidently inserted by the pleader by way of antithesis to the preceding charge that the rule had not been enforced against other patrons who were in default. This view is borne out by the following statement of counsel for appellant in their brief: "The thing we complain of in this case is that the rule was unreasonably applied against the appellant; that under it the appellee refused appellant telephone service when he did not owe a cent under the rule." If a corporation authorized to establish and promulgate a rule as a condition to furnishing service has done so, and a patron is charged with notice of the rule, and also of the fact that he has violated it, the corporation may refuse him service for such reason without informing him at the precise time of its refusal as to its reason therefor; but the corporation would not, of course, be permitted to bring its rule forward as a mere afterthought. When it is shown that the corporation in a case of this kind has acted under a rule, thereby suggesting a colorable defense, it is required that the plaintiff should allege facts avoiding the operation of the rule. See *Morgan v. Lake Shore, etc., Ry. Co.*, 130 Ind. 101, 28 N. E. 548. The mere fact that appellee has not enforced its by-law or rule against third persons before that time does not alone furnish a reason why it should not be revived as against appellant. As before observed, for aught that appears in the complaint, he may have been fully apprised in advance of the consequence of his refusal to pay. We are not at present dealing with the subject of discrimination. We shall consider that point hereafter.

The case cited by appellant's counsel to the effect that corporations engaged in the performance of a *quasi* public function, as in the furnishing of light, water, or gas, cannot, by the enforcement of their rules, preclude the courts from an examination into the facts are not in point. In this case no question is involved growing out of the relation of the parties as telephone company and patron. The appellee, it may be inferred, had rendered perfect service, and had in all respects complied with its agreement

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with appellant as its patron, and it is admitted that appellant's indebtedness to it had matured. What appellant asserts is that he has an independent claim against the appellee sufficient to extinguish the latter's claim, and that the company must continue to furnish him service, and go into court as a suitor if it desires to collect its bill, or at its peril defend suits for penalties which might be accumulated *ad infinitum*. It will be observed that it is not alleged that the company is insolvent, and that it does not appear that the company is not in good faith disputing the validity of appellant's claim to a set-off. Considering the *quasi* public functions of corporations like the one at bar—corporations whose first duty is to the public whom they serve—we think that their revenues should not be depleted by the furnishing of service to individuals who refuse to pay because they are asserting collateral demands against it. In the course of the opinion by the appellate court on the former appeal of this cause it was said: "It cannot be denied that a rule of the company requiring these monthly payments to be made in advance would have been a reasonable rule, and that upon refusal so to pay service could be denied. The company must protect its plant, and keep up its efficiency, and may enforce a rule that insures a reasonable revenue and its prompt receipt. It can maintain an efficient service only through prompt payment of all dues and tolls, and because of that fact it may use the summary remedy of denying service for nonpayment. It cannot be said it may be denied the benefit of this rule because a patron claims the company is indebted to him. It cannot be required to stop and adjudicate claims held against it. The law compels it to furnish service. A patron may take service or not, as he chooses. It must furnish efficient service to all alike who are alike situated, and must not discriminate in favor of or against any one. For failure the extraordinary remedies of *mandamus* and *injunction* may be successfully invoked. It may be said that the courts are open to the company to collect its claim, but as to this the company and the patrons are on an equal footing. The fact that the patron is solvent aids nothing in determining a rule which must apply to solvent and insolvent patrons alike. Keep-

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ing in view the nature of the company's duties, and the services it may be compelled to render, it must be held that the company may enforce the payment of its current dues and tolls by the summary remedy of denying service regardless of the fact that the subscriber claims the company is indebted to him." The right of set-off as to independent demands having in them no element on which to base a claim of equitable intervention is statutory (*Boil v. Simms*, 60 Ind. 162, 168; *Pomeroy's Code Remedies*, sec. 729; 25 Amer. & Eng. Ency. Law, 489; *Waterman on Set-Off*, secs. 9, 12, 13, 16. See *Willis v. Browning*, 96 Ind. 149, 151), and, whatever may be the effect of a set-off when allowed by the court, we deem it clear that in an action for the enforcement of a penalty the plaintiff will not be allowed to draw in issue a claim of set-off on his part. In the circumstances of this case it appears that, if neither party will yield, a resort to the law is practically the only remedy, and we think that appellant should be content with the opportunity to assert his independent demand on the civil side of the court.

As to the claim of discrimination, the statement of the complaint that 35 other patrons of the company "were in like situation with the plaintiff" is a mere conclusion. So far as averment goes, they are only shown to be in default. It is not shown that they refuse to pay.

It is contended that the action of appellee deprives appellant of property without due process of law. He has not been deprived of his tangible property or of his stock, and, as to the deprivation of telephone service, that has been brought about by his violation of a rule which we hold valid. He may regain his right by paying the rental up to the time service was denied him, and complying with such lawful conditions as the company has established. As to his own demand, he was at liberty to resort to the courts. This case differs essentially from the case of *Indiana, etc., Co. v. State ex rel. Ball*, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761, where it was claimed that a public corporation had unlawfully discriminated against an individual, and thereby denied him the equal protection of the laws.

Cumberland Telephone & Telegraph Co. v. Hendon.

While this court asserts, and has exercised, the right of treating the failure upon the part of an appellee to brief a cause as tantamount to a confession of error, yet it does not follow that the mere refusal of appellee's counsel to argue a point that they apparently believe to be without merit must lead to a reversal. On the contrary, where the neglect of appellee's counsel has not been so flagrant as to demand a reversal as a measure of protection to the court on appeal, the rule is not to reverse except for actual error. See *Martin v. Martin*, 74 Ind. 207; *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100; *Wilson v. State*, 156 Ind. 631, 59 N. E. 380, 60 N. E. 1086.

Judgment affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. HENDON.

Kentucky; Court of Appeals.

1. **WRONGFUL DISCONNECTION OF TELEPHONES; MEASURE OF DAMAGES.**—A physician's telephone was disconnected for non-payment of rent when in fact the rent had been paid at the time and for a number of months in advance. During the time that the telephone was disconnected a number of persons attempted to call up the physician but were told by the assistant manager of the company that the telephone had been disconnected for non-payment of rent. The evidence did not disclose any pecuniary loss in the suspension of service. It was held that punitive damages could not be recovered of the defendant; that the measure of damages in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused, taking as a basis the amount paid by the month.

Appeal by defendant from judgment for plaintiff. Decided January 7, 1903; reported 24 Ky. Law Rep. 1271, 71 S. W. 435.

Fairleigh, Straus & Eagles, for appellant.

Pryor & Sapinsky and *O'Neil & O'Neil*, for appellee.

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Opinion by HOBSON, J.:

Appellee, Hendon, is a physician, living in Louisville. He was a patron of the appellant, the Cumberland Telephone & Telegraph Company, and had one of its instruments in his office. Appellant discontinued the telephone from 3 o'clock p. m. of October 23, 1900, to 8:45 a. m. the next morning, or something less than 18 hours, and this action was brought to recover damages therefor. The reason the telephone was disconnected was that the book-keeper made a mistake in posting the amount paid. His book did not show that Hendon had paid for the month of September, although he had in fact paid. On October 22d a notice was sent to him that his 'phone was discontinued for this reason, and, he having paid no attention to the notice, 24 hours afterwards the connection at the office was severed, although the instrument was not removed. When he got home at 6 o'clock that evening and found that he had been cut off, he tried to 'phone to the office, but failed to get them. The next morning he went down, the mistake was at once corrected, and the instrument was no longer discontinued. The proof showed that he had not only paid for September, but had also paid in advance for October, November and December. It also showed that one person who needed the doctor for his wife that night, being unable to reach him by 'phone, walked to his office and waked him up. It also showed that three other persons who wished to talk with him were unable to reach him on the 'phone, and that, when one of them asked at the office what was the matter, the assistant manager answered that his 'phone had been discontinued for nonpayment of rent. It is not shown that he suffered any pecuniary loss by the suspension of the service, although it would seem that he was considerably annoyed about it. On these facts the jury found for him a verdict for \$200, on which the court entered judgment. The court instructed the jury that they should find for the plaintiff at least nominal damages, and, if they believed from the evidence he suffered inconvenience by reason of his telephone service being discontinued, then they should further find for him such sum as would fairly and reason-

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ably compensate him for the inconvenience so sustained. There was nothing in the case to warrant an instruction on punitive damages, and the court properly refused to instruct the jury on this subject. The plaintiff had by contract acquired the right to a certain service, and, this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass, as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract but an actual tort. The proper measure of damages to compensate for the breach of the contract is a matter of some difficulty, and we have been referred to no authorities directly in point. Where the contract is to deliver a specific message, and is broken, the measure of damage has been often adjudicated, and we see no reason why the same principles should not apply to the case before us, for the contract here was in substance an undertaking to convey all messages the subscriber might wish to send, or others might wish to send to him, over appellant's line, within the time paid for by him. In the absence of proof of special damage for the failure to carry a message, the recovery would be limited to the amount paid for the service which was not furnished. Mere inconvenience or annoyance cannot be recovered for except in peculiar cases. 25 Am. & Eng. Enc. Law, 855-863; *Chapman v. Telegraph Co.*, 3 Am. Electl. Cas. 670, 90 Ky. 265, 13 S. W. 880. Where there is a contract, not for a specific message, but for the carriage of all messages within a certain time, the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages, in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused. In case of special damage, this, in addition, may be recovered under proper averments. *Robinson v. Telegraph Co.* (Ky.), 68 S. W. 656, 57 L. R. A. 611. Under the evidence, the court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his 'phone was

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discontinued, taking for the basis the amount paid by the month, and allowing for the time lost such part thereof as they deemed right.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

STATE EX REL. PAYNE V. KINLOCH TELEPHONE CO.

Missouri; Court of Appeals of St. Louis.

1. DUTIES OF TELEPHONE COMPANIES TO FURNISH SERVICES.—Telephone companies are common carriers in the sense that they are bound to furnish service to any one offering to comply with their reasonable requirements, not only in respect to their public station system, but also as to the so-called private system of instruments installed in offices, residences and places of business. Reasonable rules may be adopted determining the rights and duties of the contracting parties, but such rules must be reasonable and preserve equal privileges to all persons similarly situated. A rule which is not brought to the attention of the applicant for the service at the time the contract is entered into is not binding. A telephone company cannot, therefore, sustain an exaction of back rent for the time during which the instrument furnished was not in working order, upon the application of the applicant for a re-installation of the instrument. Such requirement is not reasonable, nor is it a part of the contract for the service furnished. The fact that such company maintains public toll stations for the use of the general public would not justify its refusal to furnish private service.

Appeal by relators from a judgment denying a peremptory writ of mandamus. Decided March 18, 1902; reported 93 Mo. App. 349, 67 S. W. 684.

D. D. Holmes, for appellants.

Geo. W. Easley and Boyle, Priest & Lehmann, for respondent.

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Opinion by GOODE, J.:

An alternative writ of mandamus was issued at the instance of appellants commanding the respondent to rent to the appellants a telephone instrument, and place the same, together with the usual appurtenances, in their building, connect it with the wires of the respondent's telephone system, and so maintain it as to afford the plaintiffs the customary facilities for receiving and transmitting messages over the wires of the respondent throughout the city of St. Louis, or show cause to the contrary. Appellants constitute a copartnership doing business under the style of the Keystone View Company. The respondent, the Kinloch Telephone Company, is a corporation organized under the laws of this State, and is engaged in operating a telephone system in the city of St. Louis for the transmission of news and messages for hire between its customers within said city by means of the apparatus and appliances pertaining to such a system. According to its return, it operates two systems,—one consisting of instruments located in public places, like hotels or drug stores, which any person may use at any time for a small toll; and the other a system of private instruments, placed in the offices or buildings of subscribers under special contract, and under just and reasonable rules governing their use. By its answer respondent contends that it is a common carrier in respect to the first or public system, but that as to the other it is not a common carrier, and is only bound to serve persons with whom it contracts on terms, conditions, and regulations made by the respondent. In March, 1900, the following contract was made by the parties, under which appellants subscribed for an instrument to be placed in their business quarters:

“St. Louis, Mo., March 7, 1900.

“We hereby agree to rent of the Kinloch Telephone Company at our place of business, No. 3443 Laclede avenue, one telephone on copper wire metallic circuit, for the period of five years, upon the following terms and conditions: (1) To pay \$60 per annum, in quarterly payments, said payments to be made in advance. (2) We agree to use said telephone as long as we require the use of a telephone, not to exceed five years. (3) The time of the beginning of the term to date from the installation of the instrument.

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(4) The telephone furnished to be and remain the property of the Kinloch Telephone Company, which company shall have authority to remove the same for nonpayment of the rental after reasonable notice.

"KEYSTONE VIEW COMPANY,

"per M. I. PAYNE, President."

Appellants paid the hire of the telephone for which they subscribed until the 1st day of October, 1900, it seems, or two quarters. It worked badly, and messages could not be received or transmitted over it satisfactorily. Appellants complained of its defects from time to time, and attempts were made to put it in good working order, but without success, until about the 15th day of December. In the meanwhile appellants became so dissatisfied with the appliance, and tired of waiting for it to be adjusted properly, that they notified the respondent on the 31st day of August—that is, a month before the expiration of the time for which they had paid, to remove it. Respondent disregarded several notices of this kind, and on the 15th day of December the instrument was finally adjusted so that it rendered good service, and the appellants were willing and desired to retain the use of it, and so notified the respondent, tendering them on the 3d day of January the sum of \$15 for the quarter next ensuing and offering to pay them \$5 for the service during the time the instrument had been efficient prior to said date. Respondent demanded pay for the entire time the instrument had been in appellant's house, regardless of whether it worked or not,—that is, insisted on being paid for the time from October 1st to December 15th,—though there was no evidence tending to prove the telephone was of any use to the appellants during that interval. In spite of said tender and appellant's notification that they wished to retain the instrument after it became efficient, respondent removed it on the 4th day of January, 1901, and has since that time refused to restore it unless paid for all the time it was in the building at the usual rates. The claim is put forward that one rule of the company is not to reinstate a telephone which has been removed for non-payment of rent until all back payments have been made and the cost of reinstallation, amount-

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ing to \$17, also paid in advance (although the latter item was waived by the manager or superintendent of the company in this instance). The alleged rule in regard to when an instrument will be restored to a subscriber or reinstalled on his premises is not among any of the printed rules of the company furnished to subscribers, nor is it in the form of a printed rule at all, nor was it communicated to appellants when they made the contract with the respondent, or ever communicated to them until they demanded a continuance of service by the respondent.

The facts in this case are undisputed, the precise issue being whether or not the respondent is bound to install a telephone on the appellants' premises on their demand and tender of one quarter's rent in advance, plus the unpaid rent for the time they enjoyed good service by the other telephone; and whether, if there is an obligation of that kind on the respondent, it may be enforced by this remedy. Such a controversy might often turn somewhat on the regulations of the telephone company, its contracts with customers, and the behavior of the latter while using the telephone system. But, aside from the special circumstances that may arise in any case, a larger question is raised by the return to the alternative writ of mandamus in the present one, namely, whether the respondent, or any other telephone company, sustains such a relation to the citizens of the territory in which it operates its system that it is bound to enter into a contract with a citizen to furnish him telephonic facilities when requested and accompanied with an offer to pay the usual charge in advance. Notwithstanding the recency of the use of telephone communication as an aid to the transaction of social and commercial affairs, that use has increased with so much rapidity, and has become so widespread, that this question has been already presented to and passed on by the courts several times, and passed on, too, without much doubt, or difficulty; for the principle involved and to be applied to the solution of the question was well settled. Telephone companies have been held from the first to be common carriers in the sense that they are bound to furnish service to any one offering to comply with their reasonable requirements, not only in respect to

their public stations system, but also as to the so-called private system of instruments installed in offices, residences, and places of business. *State v. Bell Tel. Co.* (C. C.), 2 Am. Electl. Cas. 404, 23 Fed. 539; *State v. Delaware & A. Telegraph & Telephone Co.* (C. C.), 3 Am. Electl. Cas. 533, 47 Fed. 633; *State v. Bell Tel. Co.*, 1 Am. Electl. Cas. 299, 36 Ohio St. 296, 38 Am. Rep. 583; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *Bell Tel. Co. v. Commonwealth* (Pa. Sup.), 2 Am. Electl. Cas. 407, 3 Atl. 825; *Hockett v. State*, 2 Am. Electl. Cas. 1, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Telephone Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1, 5 N. E. 721; *Central Union Tel. Co. v. State ex rel. Falley*, 2 Am. Electl. Cas. 27, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Same v. State ex rel. Hopper*, 3 Am. Electl. Cas. 529, 123 Ind. 113, 24 N. E. 215; *State v. Bell Tel. Co.*, 22 Alb. Law J. 363; *State ex rel. Webster v. Nebraska Tel. Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404. In the cases above named the duty of an incorporated company operating a telephone system in a certain locality to treat all citizens of that locality alike, and to give them all equal privileges in regard to the use of the system by entering into contracts with them and installing instruments on their premises, is recognized and upheld, as well as the power of the courts to compel the observance of this duty by a writ of mandamus. Some of the decisions are founded on statutes more or less positively prescribing the duty, and others on the common-law rule that a common carrier, or other company or person holding itself out as ready to serve the public at large in some business intimately and essentially associated with the general social and business life of the community (especially if such person or company is operating under or enjoys some advantage or franchise from the State), is bound to serve every member of the community without discrimination or partiality; and some of the decisions which are supported by a statute declare the power to enforce the obligation would exist, if there was no statute, by virtue of the principles of the common law, of which

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the statute is said to be declaratory. *Telephone Co. v. Bradbury, supra*. The duty thus imposed on telephone companies is in no sense novel, nor did its application to them involve a new principle; for their business plainly falls, by its very nature, within the class of *quasi* public employments, as to which the courts have never hesitated to restrict in some measure the right of contract for the common welfare and upon consideration of public policy. Telegraph and telephone companies are regarded by the courts as performing functions similar to those of railway, steamboat, and express companies, which conduct a general carrying business, and have always been subject to governmental supervision and regulation exercised both by legislation and judicial decisions. *Vincent v. Railroad Co.*, 49 Ill. 33; *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284. Indeed, the same abridgement of the right of contract is applied to other persons or corporations than carriers, if engaged in employments of a public character, such as innkeepers, warehousemen, mills, bakers, gas and water companies, and perhaps still others. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; *Smith v. Telegraph Co.*, 2 Am. Electl. Cas. 373, 42 Hun, 454; *State v. Joplin Waterworks*, 52 Mo. App. 312; *Shepard v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479; *People v. Manhattan Gaslight Co.*, 45 Barb. 137; *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; *Mayor, etc., v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441. Most of such cases deal with the constitutionality of statutes passed to regulate and control the conduct of certain employments; others were interferences by the courts by writs of injunction or mandamus. It is impossible to extract from them any one principle which will explain and support all the decisions in which the circumstances were held to warrant a restraint on a defendant's right to conduct his business as he pleased, or every one in which they

were held insufficient and relief was denied. Ponderous reflections on the opposed political theories of liberty and paternalism, with which they abound, serve too often only to disclose the intellectual bias of the judge who wrote the opinion, while constructions of constitutional powers and limitations have produced haphazard and contradictory results, depending more on whether the deciding tribunal deemed the regulating statute reasonable and wholesome or meddlesome and mischievous than on its clear violation of a constitutional inhibition. In fact, our fundamental principles are not threatened or questioned in any of these curtailments by courts or legislatures of unhampered individual action, because they are made to subserve, rather than destroy, free contractual rights, since they commonly are directed against extortionate or arbitrary conduct by persons, corporations, or combinations either possessing or thought to possess some monopoly or other advantage enabling them to dictate terms. That is the motive of enactments and the reason of decisions of this character, and the vital question seems to be always, whether any particular interference is justified by the existence of a condition which precludes the members of a community from negotiating for fair terms, or forces them to dispense altogether with the service rendered by the party complained of (although their welfare imperatively requires that service), unless relieved by the interposition of the public authorities. Abuses of the contract right must now and then be corrected, and they will require correction more frequently as population grows dense and commercial activities multiply.

The right to interfere by statute or judgment is placed on several grounds: First, the bestowal by the State of some extraordinary franchise or attribute, under which the party to be restrained is operating,—as in the case of railway and other companies enjoying the right of eminent domain; second, the possession of a legal monopoly, either directly granted by the State or developed from a privilege granted by it,—like licensed State lotteries and railway pools; third, possession of a virtual monopoly on account of the nature of the business,—like the warehouses whose charges were held to be subject to

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regulation by government in *People v. Budd, supra*; or fourth, simply because the business is one which closely concerns the public welfare,—like inns or grain elevators, as in *Brass v. North Dakota, supra*. An examination of the decisions shows that the right to curtail freedom of contract by compulsory measures on the part of the sovereignty through any of its branches is not exclusively nor always exercised in either of those instances,—neither where the party restrained is the donee of a valuable franchise, nor where a monopoly, legal or actual, exists, nor where the party against whom relief is invoked operates a business of great magnitude, and heavily influencing the prosperity of the community,—yet at the same time has been exercised in all such cases. In other words, the ground of this public interference with business affairs is not well settled; but the underlying principle is the right of the people, acting through their legislative representatives or their courts, for the good of the commonwealth, to set bounds to the arbitrary conduct of a natural or corporate person or combinations of either, whenever that conduct becomes intolerably oppressive and mischievous; while at the same time conceding to everybody the prerogative to make such contracts and enter into relations with such persons as he chooses inside those bounds. In this State the rule has been declared that the magnitude of a business is not cause for compelling its proprietor to assume relations with or serve a citizen against his will,—in other words, to direct or control him,—but that relief of that kind can be afforded only against parties whom the State has enabled to obtain a monopoly, or put in a position to oppress their fellow citizens by the donation of a special privilege, or where the business is *quasi* public, or the property used in conducting it has been dedicated to public use; and so it was held in *State v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. But that authority distinctly recognizes the doctrine that a corporation endowed with the power of eminent domain, or engaged in a public avocation, may be regulated and controlled in reasonable limits. So the respondent telephone company is plainly amenable to regulation if it acts arbitrarily and unconscionably against a citizen,

for it may exercise eminent domain, and has dedicated its property to the use of the public.

Respondent's justification for refusing to hire appellants a telephone and the use of its wires and current must, then, be found, if at all, in the special circumstances of this case; and in truth we understand that is its serious contention, rather than that it may permit or not, at its pleasure, the use of its so-called private system of instruments, for in its brief we find this statement:

"Here the question is not whether the appellants shall be served, but whether they shall be served without compliance with, and in defiance of, respondent's reasonable rules and regulations."

Two complete answers may be made to the question thus propounded: First, no rule or regulation of the company is shown to have been defied or violated by the appellants. The alleged rule that an instrument once taken out for nonpayment of rent would not be reinstalled until back rent was paid was not mentioned in the contract between these parties. It was not among the company's printed rules, and the appellants were never apprised of its existence until they asked the company's superintendent for renewed service. It is nonsense to term such an exaction a rule. A rule or regulation, in a proper sense (if it is neither a law of the land binding on every one, nor a judicial order binding on some designated person), in order to affect the rights of parties in their dealings and relations, must be known to them, and either expressly or impliedly assented to as part of the particular contract or transaction in reference to which it is invoked. If this alleged regulation had been communicated to these appellants when they made the contract with the respondent, they might have been held bound by it, if just. But merely notifying them afterwards that it was customary to require pay for back service before restoring a telephone was nothing more nor less than a term or condition prescribed by the respondent on compliance with which they would serve the appellants,—no rule at all. That requirement or exaction was rejected by the appellants, and they had a right to reject it unless it was lawful. Was it? We think it was not, and

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that is the second answer to the question respondent propounds. Without deciding whether a previous failure to pay rent, either from dishonesty or inability, would justify a telephone company in refusing to again install an instrument removed on account of the default until it was made whole for the back rent and cost of installation, we do decide and hold that when the customer is solvent, and it is fairly doubtful if any back rent is owing, or, as in this case, when the subscriber has paid for all the service he got (and there is practically no testimony that these appellants owe anything, while they are shown to be financially responsible), a company cannot insist on that condition,—cannot be judge in its own case, and decide the dispute. The appellants paid rent to the 1st day of October, but, as the service was a failure, notified respondent to remove the instrument at the end of the quarter. Instead of doing so, it let it remain and tinkered with it until the middle of December, when it began to work well. Then appellants wished to have it, offered to pay rent in advance, and to pay from the day it became efficient. Their request was refused unless they would pay for the time the machine rendered no service. Could anything be more unjust? Respondent's contract included, of course, the rendering of reasonably good telephone service. It failed to keep this obligation, and yet insisted on full payment. If, in fact, fair service was rendered during the time in dispute, the company has a good case to collect the rent for that time (*Webster Telephone case*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404), but cannot arbitrarily cut off appellants from a hearing, and force them to submit to its terms or do business without a telephone. The facts of cases wherein a company or individual bound to serve the entire community seeks to withdraw service from some customer on account of defaulted payments or other omission to comply with his contract must be attended to, and if it is apparent that no good cause exists for the withdrawal, and that the defendant will not be harmed by compelling it to continue to supply the customer, it should be compelled; otherwise the remedy of mandamus, which all the authorities agree may be invoked in such cases, will prove useless. Rules actually

embodied in the contract between parties, more just and reasonable than respondent's alleged rule, have been adjudged unreasonable and void; notably one which provided that the defendant company might remove the instrument (in that case a "stock ticker") from the plaintiff's office and discontinue the service, without notice, whenever the company deemed the customer had violated any of the conditions of his contract. This rule or stipulation was repudiated, because it allowed the company to arbitrarily pass on the customer's rights. *Smith v. Telegraph Co.*, 2 Am. Electl. Cas. 373, 42 Hun, 454. Nor does the fact that the respondent company provides public stations for the use of every one who will pay toll constitute a defense. It must furnish private service in residences and offices when asked, for in that way only can all persons be assured of equal privileges. *Central Union Tel. Co. v. State ex rel. Falley*, 2 Am. Electl. Cas. 27, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Same v. State ex rel. Hopper*, 3 Am. Electl. Cas. 529, 123 Ind. 113, 24 N. E. 215. The facts in this case are uncontradicted, and the lack of declarations of law is therefore immaterial, if they would be otherwise necessary.

From the considerations above stated, it results that the judgment must be reversed, and the cause remanded, with a direction to the lower court to grant a peremptory writ of mandamus to the plaintiffs for the relief they ask.

BLAND, P. J., and BARCLAY, J., concur.

Rights and Duties of Telephone Companies.

1. Telephone company as common carrier.
2. Duties as common carrier.
 - (a) In general.
 - (b) Unlawful discriminations.
 - (c) Discriminations against telegraph companies.
3. Rules and regulations.
4. Duty to notify party with whom interview is sought.
5. Removal of telephone for unpaid rental; measure of damages.
6. Rights of subscribers upon transfer.
7. Legislature may fix telephone rates.

1. Telephone company as common carrier.—A corporation engaged in the business of operating a system of telephones is a common carrier of news

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and intelligence. *Nebraska Telephone Co. v. State*, 7 Am. Electl. Cas. 860, 55 Neb. 627, 76 N. W. 171; *Central Union Telephone Co. v. Swoveland*, 6 Am. Electl. Cas. 679, 14 Ind. App. 341, 42 N. E. 1035; *Hockett v. State of Indiana*, 2 Am. Electl. Cas. 1, 105 Ind. 250, 5 N. E. 178; *Central Union Telephone Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1, 5 N. E. 721; *Johnson v. State of Indiana*, 2 Am. Electl. Cas. 22, 113 Ind. 143, 15 N. E. 215; *Central Union Telephone Co. v. State*, 2 Am. Electl. Cas. 27, 118 Ind. 194, 19 N. E. 604; *State ex rel. Postal Telegraph Cable Co. v. Delaware & A. Telegraph & Teleph. Co.*, 3 Am. Electl. Cas. 533, 47 Fed. 633; *State v. Nebraska Teleph. Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 22 N. W. 237; *Bell Telephone Co. v. Commonwealth*, 2 Am. Electl. Cas. 407, 3 Atl. 825 (Pa. Sup. Ct.); *Chesapeake & Potomac Teleph. Co. v. B. & O. Telegraph Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399; *Commercial Union Teleph. Co. v. New England Teleph. & Teleg. Co.*, 2 Am. Electl. Cas. 426, 61 Vt. 241, 17 Atl. 1071.

Both telegraph and telephone companies are engaged in business connected with the public interest, and hence the State is authorized in a large measure to dictate the manner and terms of transacting such business. While it may be true that telegraph and telephone companies do not occupy the exact legal status of common carriers of passengers and freight, yet they bear a strong analogy to these. Thus the rule which applies to common carriers that, although they may not be insurers, yet they are bound to serve the public with impartiality and diligence in the discharge of their duties, applies equally to telegraph and telephone companies. All such companies are *quasi* public servants and the law makes it their duty to serve the public impartially and in good faith. *Central Union Telephone Co. v. Swoveland*, 6 Am. Electl. Cas. 679, 14 Ind. App. 341, 42 N. E. 1035. In the case of *Hockett v. State*, 2 Am. Electl. Cas. 1, 105 Ind. 250, 5 N. E. 178, the court said: "The telephone is one of the remarkable productions of the present century, and although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may, therefore, be regarded, when relatively considered, as an indispensable instrument in commerce. The relations which it has assumed toward the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by the telephone company in the transaction of its business are consequently, in legal contemplation, devoted to a public use."

2. Duties as common carrier.

(a) *In general*.—The telephone being an important and indispensable instrument of commerce, and thus companies operating telephone systems being subjected to the duties and obligations of common carriers, such companies

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are required, under the law, to perform impartially the functions which they have assumed. The law requires them to serve all alike upon compliance with such reasonable rules and regulations as are made by them for the transaction of their business. *Chesapeake & Potomac Telephone Co. v. B. & O. Telegraph Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399, 7 Atl. 809. Telephone companies have assumed the character, functions and duties of common carriers, and thus made themselves subject to the same principles and rules of law applicable to all other common carriers, the chief one of which is that they must serve the public impartially. *State ex rel. Postal Telegraph Cable Co. v. Delaware & A. Telegraph & Telephone Co.*, 47 Fed. 633, aff'd 4 Am. Electl. Cas. 579, 50 Fed. 677. In this case the court held that a local telephone company could not bind itself to discriminate in favor of the one telegraph company and against another, refusing to furnish to the latter telephone instruments, and service to be used in receiving and transmitting telegrams. The same question arose in the case of *State v. Bell Telephone Co.*, 2 Am. Electl. Cas. 404, 23 Fed. 539, in which the court said: "The moment it (a telephone company) establishes a telephonic system, it is bound to deal equally with all citizens in their department of business, and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service."

(b) *Unlawful discriminations*.—The question of unlawful discrimination as between telephone patrons is usually controlled by statute. Such a statute prohibiting discrimination by telephone companies applies not only to discrimination between applicants for telephonic service, but also between patrons having instruments, so that a company refusing to connect two subscribers became liable for the statutory penalty. *Central Union Telephone Co. v. Fehring*, 6 Am. Electl. Cas. 694, 146 Ind. 189, 45 N. E. 64. A telephone company cannot evade a statute requiring it to furnish connections and facilities to all applicants within its territorial limits, without discrimination, and a fixed maximum rate, by adopting the "public stations" instead of the "rental" system. *Central Union Telephone Co. v. State*, 3 Am. Electl. Cas. 529, 123 Ind. 113, 24 N. E. 215. In the case of *In re Baldwinville Telephone Co.*, 24 Misc. 221, 53 N. Y. Supp. 574, it was held that a reasonable construction of the New York State Transportation Corporations Law does not require a telephone company to furnish to another company connection with its system, to be used by the latter as part of its own system, upon payment of the ordinary subscribers' tariff.

Where a statute imposes upon a telephone company the duty to serve the public impartially and without discrimination, and a telephone company accepts a license from another company to use its patented instruments and devices subject to certain conditions and limitations, it has been held that the duty imposed by the statute will be subjected to the restrictions contained in the contract for the use of the instruments. The court stated the rule to be that not even the Legislature could directly interfere with contract rights by compelling the licensee company to do that which its contract prohibits,

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though it might deny the use of highways to companies in any way prohibited by contract or otherwise from serving all comers impartially.

Independent of the statute, however, the duty is imposed by law upon telephone companies to supply all those who are in similar circumstances, the same facilities, under reasonable limitations, for the use of its telephonic system, without discrimination. It cannot impose the condition that the patron agree to use its telephone system exclusively, particularly when such stipulation is not required of others in the same business and neighborhood. *State ex rel. Gwynne v. Citizens' Telephone Co.*, 7 Am. Electl. Cas. 838, 61 S. C. 83, 39 S. E. 257. A telephone company as a public service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price which it charges every other patron for the same service under substantially the same or similar conditions. *Nebraska Telephone Co. v. State*, 7 Am. Electl. Cas. 860, 55 Neb. 627, 76 N. W. 171; see, also, in this connection *State v. Nebraska Telephone Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 22 N. W. 237; *People ex rel. Postal Telegraph Cable Co. v. Hudson River Telephone Co.*, 2 Am. Electl. Cas. 394, 19 Abb. N. C. (N. Y.) 466; *Central Union Teleph. Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1, 5 N. E. 721; *Central Union Teleph. Co. v. State*, 2 Am. Electl. Cas. 27, 118 Ind. 194, 19 N. E. 604.

(c.) *Discrimination against telegraph companies.*—A contract between one telephone company and another company for the rental of telephonic instruments and appliances, which forbids the use of the instruments thereby leased to be given to certain telegraph companies, is void as in derogation of public policy and of a statute which forbids such discrimination. *State ex rel. American Union Teleg. Co. v. Bell Telephone Co.*, 1 Am. Electl. Cas. 299, 36 Ohio St. 299; *State ex rel. Amer. Union Teleg. Co. v. Bell Teleph. Co.*, 1 Am. Electl. Cas. 304, note; *State ex rel. B. & O. Tele. Co. v. Bell Teleph. Co.*, 2 Am. Electl. Cas. 404, 23 Fed. 539; *Bell Teleph. Co. v. Commonwealth*, 2 Am. Electl. Cas. 407, 17 Wkly. Notes Cas. (Pa.) 505; *Atlantic, Chesapeake & P. Teleph. Co. v. B. & O. Teleg. Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399, 7 Atl. 809; *Commercial Union Teleg. Co. v. N. E. Teleph. & Telegraph Co.*, 2 Am. Electl. Cas. 426, 61 Vt. 241, 17 Atl. 1071; *State ex rel. Postal Telegraph Cable Co. v. Delaware & A. Teleg. & Teleph. Co.*, 3 Am. Electl. Cas. 533, 47 Fed. 633, aff'd 4 Am. Electl. Cas. 579, 50 Fed. 677; see contra, *Amer. Rapid Teleg. Co. v. Connecticut Teleph. Co.*, 1 Am. Electl. Cas. 390, 59 Conn. 352.

3. Rules and regulations.—Telephone companies have the right to make reasonable regulations controlling the transaction of their business. Such regulations must be reasonable and cannot have the effect of relieving a company of the duties and obligations which it owes its patrons by means of its public character. *Central Union Teleph. Co. v. Swoveland*, 6 Am. Electl. Cas. 679, 14 Ind. App. 341, 42 N. E. 1035. In the case of *People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co.*, 2 Am. Electl. Cas. 394, 19 Abb. N. C. (N. Y.) 466, a regulation of a telephone company forbidding the use of its instrument for messages in respect to which toll is to be paid to any other

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party than the telephone company, was held reasonable at common law, and not forbidden by the New York statute; a regulation forbidding the use of telephones to call messengers, except those in the employ of the telephone company, was held unreasonable and void. In the case of *Louisville Transfer Co. v. Amer. District Telephone Co.*, 1 Am. Electl. Cas. 305, note, 24 Albany Law J. 283, both parties were engaged in the carriage and coupe service, and the defendant insisted upon the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupes. The court held otherwise, and granted an injunction restraining the defendant from removing the telephone, and from refusing to transact the plaintiff's business.

A condition in the contract of a telephone company with its patrons forbidding the use of profane and indecent language over the telephone, is reasonable, and properly enforced by refusing further service in case of refusal of the patron to observe it. *Pugh v. City & Suburban Teleph. Assn.*, 1 Am. Electl. Cas. 471, 9 Cinn. Law Bul. 104.

4. Duty to notify party with whom interview is sought.—It is a part of the duty of a telephone company in relation to its toll service business to notify the party with whom a telephone interview is sought, provided he be within a reasonable distance, that he is wanted at the instrument at the terminal station, and to do so within a reasonable time. A regulation, publicly displayed at the station of a telephone company, that it will not undertake to deliver messages and that any person who assists in conversation does so as the agent of the patron, and not of the company, does not excuse the company's failure to give such notification. *Central Union Teleph. Co. v. Swoveland*, 6 Am. Electl. Cas. 679, 14 Ind. App. 341, 42 N. E. 1035.

5. Removal of telephone for unpaid rental; measure of damages.—A telephone company having contracted to furnish the proprietor of a general messenger business with the use of a telephone for a fixed time at a fixed rate, has no right to refuse connection for the purpose of notifying persons wanted at another telephone exchange, or to remove its instrument because of refusal to pay on account of such refusal to connect, and for such removal is liable in damages. In such a case prospective profits are a proper element in measuring damages; and a verdict based on reasonable increase of business will not be disturbed as excessive. *Owensboro Harrison Teleph. Co. v. Wisdom*, 23 Ky. Law Rep. 97, 62 S. W. 529, 7 Am. Electl. Cas. 855. In the case of *Malochee v. Great Southern Teleph. & Teleg. Co.*, 49 La. Ann. 1690, 22 So. 922, it was held that a subscriber for telephone service who, in default of payment stipulated for the service, is notified by the telephone company that the telephonic instruments will be removed from his premises unless he pays the amount due, and replies that the company can do as it pleases, has no claim for damages because the instruments are thereafter removed by the company, the written notice of the removal specified in the contract, being wholly unnecessary and deemed waived.

6. Rights of subscribers upon transfer.—In the case of *Mahan v. Michigan Teleph. Co.*, 8 Am. Electl. Cas. 38, 93 N. W. 630, the franchise of a

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telephone company had been transferred under an ordinance authorizing such transfer subject to the terms and conditions prescribed thereby; it was held that the permitting of access by the transferee to its service to the subscribers of the original company implied a construction of the ordinance to the effect that the transferee was bound thereby to furnish service to the subscribers of the original company, and such an implied construction cannot afterwards be repudiated; such subscribers may enforce their rights against the purchasing company by mandamus.

7. Legislature may fix telephone rates.—A telephone company being a common carrier, and not a mere private business corporation, its instruments and appliances are in legal contemplation devoted to a public use, and are thus subject to legislative regulation and control. The State may regulate the rental price of telephones, to the extent of fixing a maximum price. This is by virtue of the police power of the State, and is not affected by the fact that the articles used and furnished to patrons by the telephone company are patented. *Hockett v. State*, 2 Am. Electl. Cas. 1, 105 Ind. 250, 5 N. E. 178; *Central Union Telephone Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1, 5 N. E. 721; *Johnson v. State of Indiana*, 2 Am. Electl. Cas. 22, 113 Ind. 143, 15 N. E. 215; *Central Union Teleph. Co. v. State*, 2 Am. Electl. Cas. 127, 118 Ind. 194, 19 N. E. 604. A statute prescribing a fixed maximum rental for telephones cannot be evaded by charging the maximum for the subscribers' use and an additional fixed sum for the use of an instrument by "non-subscribers." *Johnson v. State of Indiana*, 2 Am. Electl. Cas. 22, 113 Ind. 143, 15 N. E. 215.

In the case of *City of St. Louis v. Bell Telephone Co.*, 2 Am. Electl. Cas. 44, 96 Mo. 623, 10 S. W. 197, it was in effect held that although power might be vested in the Legislature to regulate telephone rates and to authorize cities to regulate them, municipal authorities, in the absence of express statutory authority, cannot fix or limit the rates of charges of telephone companies doing business within the limits of the city.

The power to determine what compensation a telephone company may exact for services to be rendered by it is a legislative and not a judicial function. *Nebraska Telephone Co. v. State*, 7 Am. Electl. Cas. 860, 55 Neb. 627, 76 N. W. 171.

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PATRONS OF ELECTRIC LIGHT COMPANIES.

SNELL V. CLINTON ELEC. L., H. & P. CO.

Illinois; Supreme Court.

1. **ELECTRIC LIGHT TRANSFORMERS; RIGHT OF COMPANY TO CHARGE THEREFOR; UNJUST DISCRIMINATION.**—It is an unjust discrimination for an electric light company to refuse to furnish to a customer a transformer or converter for the purpose of reducing the current from the main line so as to permit of its safe use for electric lighting purposes in a house, without an extra charge therefor, where it appears that such company has furnished such instruments to other customers without extra pay; such refusal is not justified upon the ground that where no charge was made for such transformers the electric wiring was installed by the electric light company.

Appeal by petitioner from a judgment of the appellate court reversing a judgment awarding a writ of mandamus against the defendant. Decided April 16, 1902; reported 196 Ill. 626, 63 N. E. 1082.

Statement by CARTER, J.:

This was a petition for mandamus, filed in the Circuit Court of De Witt county, to compel appellee to furnish appellant with electricity for lighting his house, as is alleged, upon the same terms and conditions that it required from its other consumers. The petition alleged that appellee refused to connect its wires with appellant's house unless he would pay for a transformer or converter, in addition to the usual charge for electric lighting, which payment appellant refused to make, on the ground that appellee did not require it of its other consumers, but furnished them a transformer without any additional charge. A jury heard the evidence and found the facts specially. On the findings by the jury and on the propositions of law afterward submitted and held, the court awarded the writ of mandamus. Appellee appealed to the appellate court, for the third district, which court reversed the judgment of the Circuit Court, and the petitioner appealed to this court. The facts as found by the jury are, substantially, that appellant applied to appellee to furnish electricity for lighting his residence upon the same terms and conditions required by it from other consumers, and that appellee refused to do so; that appellee had not required other persons to pay for the use of transformers for dwellings, and that it was its general practice and custom to

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furnish the use of them free of charge for its customers; that it refused to furnish the use of a transformer to appellant because it had not been employed to wire his house, he having had such wiring done by one not connected with appellee; that appellee refused to connect with appellant's house, on the ground that his residence was not properly wired, but the jury also found that such residence was properly wired; that appellee had furnished transformers free of cost to consumers in cases where it had furnished the wires and had done the wiring of the building for compensation, and that it considered the profit accruing to it therefrom to justify it in furnishing the use of transformers without a specific charge for them; that the object and purpose of a transformer are to protect the house from destruction by fire caused by too great a voltage of electricity, and the consequent destruction of the wires in the house. A number of propositions to be held as law were offered by appellee, some of which were held as law by the court and some refused. One refused was, "Upon the findings of the jury the peremptory writ should be denied, and judgment rendered against the petitioner (the appellant) for costs."

E. J. Sweeney, for appellant.

Warner & Lemon, for appellee.

Opinion by CARTER, J.:

The trial court evidently held that the law applicable to the facts as found by the jury justified the awarding of the writ, for it refused to hold the proposition of law submitted on that question by appellee, while the appellate court was of the contrary opinion, for it made no finding of facts different from those found by the jury and the court below. The only question here is, therefore, whether or not, upon the evidence as found, the appellee made an unjust discrimination against appellant in charging him for a transformer in addition to the regular rates for electric lighting.

There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges. At common law, whether or not a difference in the treatment accorded to different patrons amounts to a discrimination must depend upon the surrounding circumstances. A mere difference does not, of necessity, constitute unlawful discrimination. Appellee, in its

answer to appellant's petition, avers that the purpose and office of a transformer is chiefly for the protection of the house or building connected with the electrical system; that it prevents an excessive number of volts of electricity from passing from the main street wire into the building to be lighted; that the wires usually used inside a building are much smaller than the street wires, and incapable of safely carrying so many volts of electricity as pass along the street wires; that if all the voltage carried on the street wires were turned into the residence the natural consequence would probably be that the house wires would melt, and the heat from the excessive voltage would cause a fire; that it is to prevent this result that a transformer is necessary. A transformer or converter is described by counsel as a coil of copper wire contained in a sheet-iron box, and is usually placed on a pole outside of the building. Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the wire leading to the house for house use. In this case the voltage would have been reduced from 1,000 volts to 50 or 100 volts. It appears that without the use of a converter the effect of turning this large voltage into a house would be to burn up the wires, and in the formation of short circuits there would be great danger of fire, and that the object of the converter is the protection of the house. It is a necessary appliance for the safe lighting of houses. The appellee had been in the habit of furnishing transformers, as needed, without any extra charge, for all houses which were wired for electricity by it, but claimed the right to charge for transformers in cases where it did not do the wiring, as it made no profit on the wiring in such cases. The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers and dynamo used in generating it. It is entirely immaterial who does the wiring of the house,—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, just as the putting in of gas and water pipes into a house is a dis-

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tinct business from furnishing the gas or water to flow through them.

The jury found that the appellee had not demanded extra pay for the use of a transformer from any one else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. While it is not bound, in the absence of statutory enactments, to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer, and without unjust discrimination. In 29 Am. & Eng. Enc. Law, 19, it is said:

"The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the line of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates."

In commenting on this, the Supreme Court of North Carolina, in *Griffin v. Water Co.*, 30 S. E. 319, 41 L. R. A. 240, says:

"If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. . . . The law will not and cannot tolerate discrimination in the charges of these *quasi* public corporations. There must be equality of rights to all and special privileges to none."

In *Cincinnati, H. & D. R. Co. v. Village of Bowling Green*, 49 N. E. 121, 41 L. R. A. 422, the Supreme Court of Ohio said:

"The light and power company have acquired in the village rights that are in the nature of a monopoly. . . . Both reason and authority deny to a corporation clothed with such rights and powers and bearing such relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. . . . The company was bound to serve all of its patrons alike. It could impose on the plaintiff in error no greater charge than it exacted of others who had used its lights."

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In *Gaslight Co. v. Hildebrand*, and *Electric Co. v. Hildebrand*, 42 S. W. 351, the Court of Appeals of Kentucky said:

"Practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices or impose different terms and conditions, according to their caprice or whim."

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It has been held at common law, and, in the absence of statutes, in the case of common carriers, that, as long as they carry at a reasonable rate for every shipper, no one can complain if they are willing to carry for others at a less rate. 5 Am. & Eng. Enc. Law (2d ed.) 179. If we apply this rule to the case at bar, it will be noticed that the appellee has demanded of appellant more than it has of any of its other customers. This is not the favor allowed by the common law, as just cited, but an unjust discrimination. Appellee has discriminated unjustly against appellant in any view of the law and the circumstances that we can take, and it follows that the judgment of the Circuit Court was right.

The judgment of the appellate court will be reversed, and the judgment of the Circuit Court affirmed. Judgment reversed.

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TRANSMISSION AND DELIVERY OF TELEGRAPHIC MESSAGES.

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Kansas; Supreme Court.

1. POWER OF COURT OF VISITATION OVER TELEGRAPH COMPANIES.—Chapter 38 of the Laws of 1898, extending the power, jurisdiction and control of the court of visitation over the telegraph companies and telegraph service within the State, is in *pari materia* with chapter 28 of the Laws of 1898, which created the court of visitation and attempted to extend its powers, jurisdiction and control over the railways of the State, and must be construed in connection with that act, as though the two chapters constituted but one act. Chapter 28 of the Laws of 1898 having been held unconstitutional as applied to railways, for the same reasoning chapter 38 is also unconstitutional as applied to telegraph companies.
2. CONSTITUTIONALITY OF PROVISION IMPOSING PENALTY FOR DELAY IN TRANSMITTING TELEGRAPHIC MESSAGES.—Section 7 of chapter 38 of the Laws of 1898, provides a forfeiture for failure, neglect or refusal of a telegraph company to receive, transmit and deliver, without unnecessary delay, any telegraphic message tendered under the provisions of that act. It was contended that the provisions of section 7 were not affected by the invalidity of the remaining portions of the act; but it was held that since the penalty was for unnecessary delay in transmitting messages presented after payment or tender of the charges fixed in the act, the intent of the Legislature was that the whole subject of telegraphic service, including the rates to be charged, should be under the direct control of the court of visitation created by the act, and that, therefore, the penalty imposed by this section for a noncompliance with the rulings of a body having no legal existence, is inoperative.

Error by defendant from judgment for plaintiff. Decided June 6, 1903; reported 72 Pac. 850.

Rossington, Smith & Histed and *Geo. H. Fearons*, for plaintiff in error.

Austin & Hungate, E. D. McKeever, and *A. C. Markley (Stebbins & Evans, of counsel)*, for defendant in error.

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Opinion of POLLOCK, J.:

The Legislature of the State, convened by the governor in extra session, in 1898, created the court of visitation, and by chapter 28, page 76, of the laws of that session, attempted to confer upon that body the exercise of administrative, legislative and judicial powers and jurisdiction over the railways of the State. By chapter 38, page 117, of the laws of that session, the same power and jurisdiction conferred upon the court of visitation over railways was extended over the telegraphs of the State. Section 1 of that act reads as follows:

"That from and after the taking effect of this act the court of visitation shall have the same power, jurisdiction and control over all questions concerning the regulation of the telegraph service in this State, the reasonableness of charges herein fixed, or to be fixed, by any order of said court, and in all matters concerning the regulation, management or control of telegraph companies, as is conferred upon said court of visitation in reference to railroads or railway corporations in this State."

Section 2 of the act (page 118) fixes the rates to be charged for the transmission and delivery of messages, as follows:

"That no person, company or corporation owning or operating any telegraph line in this State shall demand, charge or receive, directly or indirectly, a rate in excess of fifteen cents for the first ten words (exclusive of address and one signature), and one cent for each additional word, for transmitting any message between points within this State. And no such person, company or corporation shall demand, charge or receive, for any distance between points within this State, more than one-third of one cent for each word for messages of over ten words received between the hours of 6 o'clock a. m. and 6 o'clock p. m., and one-sixth of one cent per word for messages received between the hours of 6 o'clock p. m. and 6 o'clock a. m. to be transmitted as special reports for newspapers."

Section 7 (page 119) makes provision for a forfeiture and its collection for the failure, neglect, or refusal to receive, transmit, or deliver, without unnecessary delay, any messages under the terms of the act, as follows:

"Any person, company or corporation engaged in the business of receiving and transmitting telegraphic messages within the State refusing, failing or neglecting to receive (either from the person sending the same or any connecting line), transmit and deliver, without unnecessary delay, any message

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offered for transmission, after the legal charges under this act for transmission have been paid or tendered, or refusing, failing or neglecting to transmit and deliver, without unnecessary delay, any message received for transmission and delivery, either from the person sending the same or any connecting line, shall forfeit and be liable to the person sending or trying to send such message and to the person to whom the same was sent or directed, in the sum of one hundred dollars each, as damages, to be recovered in a civil action by each of said parties in any court of competent jurisdiction, together with a reasonable attorney's fee in each court into which said action may be taken, by appeal or otherwise. This section shall not in any manner affect the rights of such persons to recover actual damages for failure to send or deliver such message, in addition to the forfeiture herein provided for."

Section 8 of the act (page 120) makes the violation of any of the provisions of the act criminal, as follows:

"Any person, company or corporation, or any agent, servant or employee of any person, company or corporation, violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, and imprisonment in the county jail not less than thirty days nor more than one year."

This action was brought by Edwin A. Austin against the Western Union Telegraph Company to recover the statutory penalty or forfeiture of \$100 and attorney's fees provided for by the terms of section 7 of the act for failure of the company to deliver, without unnecessary delay, a message sent by him to one Markley from Topeka to Lyndon, Kan., on the 8th day of November, 1899. At the trial there was judgment for plaintiff for the statutory forfeiture of \$100 and attorney's fees as provided in the act. The telegraph company brings error.

The question presented for our consideration and determination is the validity of that section of the act making provision for a forfeiture and its collection. This court, in the case of *The State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662, held chapter 28, page 76, Laws 1898, unconstitutional and void, for the reason it constituted an attempt on the part of the Legislature to confer upon one body the power and jurisdiction to exercise administrative, legislative and judicial functions, in violation of the fundamental principles of our government. Upon the authority

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of that case, and by the same process of reasoning there employed, it must be held chapter 38, page 117, Laws 1898, is unconstitutional and void in so far as it attempts to confer like jurisdiction and power over the telegraphs of the State. Thus far, all agree. It is, however, contended that section 7 of that act may stand alone, as a separate and independent enactment, unaffected by the declared unconstitutionality of chapter 28, which created the court of visitation and defined its powers and jurisdiction in relation to railways, and the conceded invalidity of chapter 38, in so far as the like jurisdiction and power of that court was attempted to be extended over the telegraph lines and telegraphic service of the State.

In considering the merits of this contention, and the ability of section 7 to stand alone as an independent enactment, in what light must it be viewed? What well recognized and established principles of the law must be applied? This court, in *Re Hall, Petitioner*, 38 Kan. 670, 17 Pac. 649, held:

“Laws enacted by the same Legislature about the same time and concerning the same subject-matter, being in *pari materia*, are to be taken and considered together in order to determine the legislative purpose and arrive at the true result.”

Prior to 1898 there existed in this State a board of railroad commissioners. By chapter 29, page 91, Laws 1898, the act creating that board, and all acts in relation thereto, were expressly repealed, and the court of visitation, a new creation, formerly unknown to the State, was created, and its power and jurisdiction over the railways of the State was therein defined. Chapter 38, passed at the same extra session of the Legislature, and about the same time, extended like power, jurisdiction and control of that body over the telegraphs of the State, and by chapter 19, page 57, Laws 1898, like power, jurisdiction and control as was given the court of visitation over railways and telegraphs was extended over the express companies of the State, all evincing one general scheme of legislation, of which the new court of visitation, with complicated, strange and varied powers, was the central and paramount idea. Hence we arrive at the conclusion that the provisions of

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chapter 38 must be viewed in the same light, and construed in the same manner and with like results, as though that chapter formed a part of the parent act—chapter 28. Thus considered as one law, parts of which have been stricken down by the mandate of this court, how are the remaining provisions to be construed, and what presumptions in regard to the validity of the remaining provisions are to be indulged? In a note to Cooley's Constitutional Limitations (5th ed.), 213, it is said: "It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the Legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the Legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void."

The same rule is stated by BARTHOLOMEW, C. J., in delivering the opinion in *Martin v. Tyler* (N. D.), 60 N. W. 392, 25 L. R. A. 838, as follows:

"It is our duty to sustain statutes in their entirety when possible, and to that end we must indulge all reasonable presumptions in favor of their constitutionality. But, when a statute has been once emasculated, these presumptions no longer obtain in support of the remainder. It should then be manifestly clear that the remaining portion can stand by itself, and that the Legislature did not intend that such portion should be controlled and modified in its construction and effect by the rejected part."

See, also, *State v. Stewart*, 71 N. W. 998; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

Therefore the general rule, that every reasonable presumption is to be indulged in favor of the constitutionality of an entire act, or a portion of an entire act, no part of which has been held void, does not here obtain, but it must be clear from a consideration of the entire act that the remaining provisions, one of which is now challenged, are not dependent upon those portions of the act heretofore declared void, but may stand as a valid, separate and independent enactment. This court, in *Central Branch U. P. R. Co. v. A. T. & S. F. R. Co.*, 28 Kan. 453, held: "While it is undoubtedly true that a statute may be constitutional in one part, and unconstitutional in another, yet this rule obtains only where the two parts are separate and independent; and where they are so related that the latter is a condition of, a compensation for, or an inducement to, the former, or where it is obvious that the Legislature, having respect to opposing rights and interests, would not have enacted one but for the other, then the unconstitutionality of the latter avoids the entire statute."

In the opinion, delivered by Mr. Justice BREWER, it is said:

"And now we remark, in the first place, that while it is undoubtedly true that a statute may be constitutional in part and unconstitutional in part, yet as a general proposition it has its limitations. The mere fact that the one part, standing alone, would be within the scope of the legislative power, does not prove that it can be upheld when coupled with other matter. If such other matter conflicts with the constitution, and must fall, then the constitutionality of the first depends upon the extent and closeness of its connection with the second. If the first be conditioned upon the second, or if it is apparent that the Legislature would not have enacted the first but for the second, that the latter was, as it were, an inducement to the former, and that only by virtue of a concurrence of the two would it be presumed that in the judgment of the lawmaking power the respective rights of antagonistic parties would be preserved, then with the fall of the second falls also the first. It is not enough to say that the Legislature might have legally enacted the first alone. When it has coupled the two together, the failure of the latter invalidates the former, and this for the reason that because of the mutuality of the two, the relation *inter sese*, the dependence of the one upon the other, the correspondence of blessing and burden, it must be presumed that the one was an inducement to or a condition of the other; that the Legislature would not have enacted one but for the other."

In support of the argument made, there was cited and quoted from, with approval, Cooley on Constitutional Limitations (5th ed.), 179; the argument of C. J. SHAW in *Warren v. Mayor, etc.*, 2 Gray, 84; *Slauson v. City of Racine*, 13 Wis. 398; *Meshmeier v. State*, 11 Ind. 482; *Lathrop v. Mills*, 19 Cal. 529. Viewed in the light of this authority and the many others elucidating the general rule here enunciated, can it be held the provisions of the act now under consideration, providing for a forfeiture, may stand as a valid, separate and independent enactment? We think not. Neither do we think, as contended by counsel for defendant in error, that the parts of the law heretofore held unconstitutional and void may not be looked to in determining the validity of the remaining portions of the law. In *Commonwealth v. Potts*, 79 Pa. 164, it is held: "Although the proviso was not effectual because of its unconstitutionality, it could not be stricken out in interpreting the section."

Coming now to the relation and dependence of that provision of the act here assailed, an examination of the act shows that section 2 of chapter 38 fixes a rate at which messages shall be transmitted and delivered within the State, but section 1 declares such rate to have been established temporarily, subject to regulation and change by the court of visitation, and not as a permanent fixing of rates by the Legislature. This is shown by section 1 of the act above quoted, wherein it is provided that the court of visitation shall have the same power, jurisdiction and control over the reasonableness of rates fixed in the act, or thereafter to be fixed by the court, as was conferred upon the court to fix rates for the railway companies of the State, for when reference is made to that act it is found the power of the court to fix rates for services performed by railroad companies is left entirely to the judgment of the court. By an examination of the language employed in section 7 it will be seen that section does not provide a penalty or forfeiture for failure, refusal or neglect of the defendant company to receive, transmit and deliver, without unnecessary delay, messages over its lines, under contract with the sender generally, but for failure, neglect, or refusal to receive, transmit and deliver,

without unnecessary delay, all messages presented, after payment or tender of the charges fixed in the act. Manifestly, therefore, it was the intent of the Legislature that the whole subject of telegraphic service, including the rates to be charged, for services performed within the State, should be under the direct control of the court so created, and subject to change at liberty by ruling of that court. To enforce compliance with the rulings of that court, section 7 was enacted. The validity of the act creating the court and extending its powers over the railroads of the State has been denied. Thus, the general scheme of legislation of which that court was the central figure having failed, it must be held the section now under consideration, providing a penalty or forfeiture for noncompliance with the rulings of a body created by act of the Legislature, but void for want of legal existence, is inoperative and void.

Other questions are discussed by counsel. The decision made renders the consideration of such questions unnecessary.

It follows the judgment must be reversed, with directions to proceed further in accordance with this opinion. All the justices concurring.

Transmission and Delivery of Telegraphic Messages.

(This note contains citations of decisions rendered since the publication of volume 7 of the American Electrical Cases.)

1. Failure to deliver caused by disturbed conditions of lines.
2. Prima facie negligence.
3. Failure to forward message.
4. Delivery of messages.
 - a. What constitutes delivery.
 - b. Delivery at hotel.
 - c. Message sent in care of another person.
 - d. Reasonable diligence to secure delivery.
 - e. Insufficiency of address.
 - f. Delivery beyond free delivery limits.
 - g. Special contract for delivery.
5. Delay in delivery of message.
 - a. Contributory negligence of sender or addressee.
 - b. Recovery for mental anguish.

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- I. In general.
- II. Degree of relationship.
- III. Sufficiency of pleading.
- IV. South Carolina statute; intentional wrong.
- V. Negligence of telegraph company as proximate cause.
- VI. Wilful disregard of duty.
- VII. What law governs.
- VIII. Excessive damages.
 - c. Recovery for mental anguish not allowed.
 - d. Message to physician requiring services.
 - e. Non-delivery of social messages.
 - f. Commercial messages.
 - I. General rule.
 - II. Liability for damages.
 - III. Damages too remote and uncertain.
 - IV. Damages occasioned by loss of position.
 - V. Message in respect to illegal transaction.
 - g. Notice by telegram of sanction by a court of a writ of certiorari.
- 6. Error in transmission.
 - a. As to social message.
 - b. In transmission of commercial message.
 - c. Cipher messages.
 - d. Message from without State.
- 7. Liability for forged or fraudulent messages.
- 8. Contract between sender and telegraph company.
- 9. Office hours on Sunday.
- 10. Reasonableness of rule not to deliver messages at night.
- 11. Notice of claim for damages.

1. Failure to deliver caused by disturbed conditions of lines.—

It is a fairly well-settled rule that if a telegraph company discovers after accepting a message for transmission, that by reason of the disturbed conditions of its own lines it cannot perform its contract, the law imposes the duty to notify the sender. This duty is not absolute, but arises only when ordinary prudence in the protection of the interests of the party concerned requires it. Where a telegraph company receives a message to be transmitted over its own line and over a connecting line, and learns on tendering the message to the second party that such company's lines are not in order, so that the message cannot be promptly delivered, it is the duty of the company receiving the message to notify the sender of such fact. *West. Un. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122.

The contract by a telegraph company exempting such company from liability for delay in the transmission and delivery of messages caused by unavoidable interruptions, does not relieve the company from liability for delays which were occasioned by causes existing and known to the agent of the company at the time the message was received, but not imparted to the

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sender. A telegraph company may properly refuse to receive a message because of its lines being down, but if such message is received without informing the sender of such fact, the company will be held liable for its failure to deliver the message within a reasonable time. *West. Un. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181.

2. Prima facie evidence.—Where, in an action against a telegraph company for a failure to deliver a message, it is shown that the company received the message with charges prepaid, a *prima facie* case is made out, and it is then incumbent upon the defendant to show why the message was not delivered. The fact that the addressee of a telegram lives several miles from the point to which the message is directed, does not excuse the company from making prompt and diligent inquiry to see if he is not within its delivery district, when the message arrives. *Rosser v. West. Un. Tel. Co.*, 130 N. C. 251, 41 S. E. 378.

While the fact that the message which had been received had not been delivered was *prima facie* evidence of negligence, the presumption is not conclusive, and the jury, considering the evidence in the light most favorable to the defendant, might find that it had not been negligent, and it is therefore proper to submit the issue to them. *Hunter v. West. Un. Tel. Co.*, 130 N. C. 602, 41 S. E. 796.

Where a telegram remained in the hands of a telegraph company for fourteen hours without delivery, and there was no evidence of an attempt to deliver such telegram, it is sufficient to show reckless disregard of the rights of the plaintiff. *Young v. West. Un. Tel. Co.*, 65 S. C. 93, 43 S. E. 448.

The failure to deliver a message for twenty-four hours subsequent to its transmission is *prima facie* negligence which, if unexcused, renders the company liable. *West. Un. Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23, 67 S. W. 159.

A delay of twenty-seven hours by a telegraph company in transmitting a message to a place twenty-two miles distant, not shown by it to be due to an act of God, the fault of the sender or other matters beyond its control, is unreasonable, and the jury was properly instructed that upon such facts the company is liable for damages. *West. Un. Tel. Co. v. Parsons*, 24 Ky. L&W Rep. 2008, 72 S. W. 800.

3. Failure to forward message.—Where a message is received for transmission at the regular rate the company is not liable for a failure to repeat or forward such message from the office to which it was transmitted to another place, where the sendee then was. An agreement made with the operator receiving the message to repeat or forward it if the sendee could not be found at the place addressed was without consideration and imposed no contractual obligation upon the telegraph company. *Abbott v. West. Un. Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

4. Delivery of messages.

a. What constitutes delivery.—Where the messenger of a telegraph company, in telephoning a message to the addressee acted as the latter's agent, the company was not liable, though the message was not telephoned cor-

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rectly. A telegraph company does not, by merely accepting a message for transmission, impliedly agree to deliver it to the addressee in person, but only to make such a delivery as will be good in law. A delivery of a telegram which is good in law as between the company and the addressee is good as between the company and the sender. *Norman v. West Un. Tel. Co.*, 31 Wash. 577, 72 Pac. 474.

b. *Delivery at hotel*.—Where the addressee of a telegram directed the clerk of a hotel at which he boarded to forward messages brought there for him, he thereby constituted the clerk his agent for the receipt of messages. Where a clerk receives a message to such addressee for the purpose of forwarding it, and indorses upon it the address to which it was to be forwarded, and delivered it to the messenger boy with verbal orders to forward as directed, it is a sufficient delivery of the message to the clerk by the telegraph company. *West. Un. Tel. Co. v. Barefoot* (Tex. Sup. Ct.), 76 S. W. 914, rev'g 74 S. W. 560.

In the absence of knowledge by an agent of a telegraph company that a person to whom a message was directed had deputed the proprietor of a hotel at which he was stopping as his agent for the purpose of receiving telegrams, it is not negligent for the telegraph company or its agent to fail to deliver such a message to the proprietor of such hotel. *West. Un. Tel. Co. v. Redinger* (Tex. Civ. App.), 66 S. W. 485.

It is negligence for a telegraph company to deliver a message at the hotel where the addressee resides, where the message is directed to him in care of a business firm. *Barefoot v. West. Un. Tel. Co.*, 28 Tex. Civ. App. 457, 67 S. W. 912.

c. *Message sent in care of another person*.—The sender of a telegram who sends the same addressed to the addressee in the care of his employer, is himself responsible for the refusal of the employer to receive the telegram, and liability therefor cannot be imputed to the telegraph company. Where a person to whom such a telegram is addressed refuses to receive the same, the telegraph company must use every reasonable effort to find and deliver the message to the addressee, and on failure to do so to ask for a better address. *Hinson v. Postal Telegraph Cable Co.*, 132 N. C. 460, 43 S. E. 945.

d. *Reasonable diligence to secure delivery*.—The contract of a telegraph company to deliver a message, stipulating for a special charge for a delivery outside of the free delivery limits, requires the company to use ordinary diligence in making the delivery, whether inside or outside of the limits prescribed. Ordinary diligence does not consist of the agent's mailing a postal card to the addressee stating that he had a message, where it appeared that such addressee lived seven miles from the office, but that one of his neighbors, well known in the community, offered to take it to him free of charge. *West. Un. Tel. Co. v. Swearingen* (Tex. Civ. App.), 65 S. W. 1080.

A telegraph company should use such care and diligence in transmitting and delivering telegrams as an ordinarily prudent person would use under similar circumstances. *West. Un. Tel. Co. v. Burns* (Tex. Civ. App.), 70 S. W. 784.

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Reasonable diligence does not require the company to deliver a message to the addressee at a certain town several miles from the place where the office at which the message was received was located. *West. Un. Tel. Co. v. Sycaringen*, 95 Tex. 420, 67 S. W. 767, rev'g 65 S. W. 108.

On the question of whether or not the whereabouts of an addressee of a telegram could be ascertained by the exercise of reasonable diligence, the testimony of persons residing within the limits of the village where such addressee resided that they knew her, and that she was well known in the village, was admissible; but testimony of persons residing in such village that they did not know her is not admissible. *West. Un. Tel. Co. v. James*. (Tex. Civ. App.), 73 S. W. 79.

Where, on receipt of a telegram message at its destination, without street address or number of the addressee, it was at once delivered to a messenger who spent all the afternoon of the day in searching for information as to the addressee, without success, whereupon he returned the message to the office, and a service message was sent to the original station for a more specific address, and on receipt of another telegram the message was delivered, the telegraph company was not guilty of gross negligence in delivering the message. *West. Un. Tel. Co. v. Cross Admr.* (Ky. Ct. App.), 74 S. W. 1099.

e. Insufficiency of address.—The plaintiff failed to receive a telegram sent to him in a town where he was working. He was described in the telegram as "traveling picture man." The messenger carried the telegram to all the hotels in the town and to a boarding house. The plaintiff did not stop in a hotel or boarding house, but camped in a wagon yard. The messenger also went to a picture store and to the office of another telegraph company. A stranger was pointed out to him as a picture man but the latter disclaimed being the plaintiff. The plaintiff had been in a drug store in the town the morning the telegram was received, where he was introduced to several persons. No one in the town knew him before. It was held that the company was not guilty of negligence. *West. Un. Tel. Co. v. Cox*. (Tex. Civ. App.), 74 S. W. 922.

f. Delivery beyond free delivery limits.—In the absence of evidence that the sender of a telegram had knowledge that the addressee resided beyond the free delivery limits of the office to which the telegram was sent, and it not appearing that the telegraph company demanded of her the payment of any extra charge for delivery beyond such limits, the failure of the telegraph company to deliver a message is not excused. *Bright v. West. Un. Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

It is negligence for a telegraph company upon the receipt of a message directed to an addressee living beyond the free delivery limits not to wire the sender demanding payment of extra charges for such service. It is not sufficient for the company to wire the sender that the party is not known, where the addressee's address was known, merely because he resided beyond the free delivery limits, and extra delivery charges were not paid by the sender. *Bryan v. West. Un. Tel. Co.*, 133 N. C. 603, 45 S. E. 938.

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A message was received on Sunday morning at about nine o'clock. By the rules of the company the office hours on that day closed at ten o'clock. The addressee resided beyond the free delivery limits. It was the custom of the company to deliver messages beyond such limits without first demanding additional cost and expense for the delivery. The delivery boy went into the business part of the town and inquired for the addressee, but failed to find him, and then telephoned to his residence. The message was not in fact delivered to the addressee until the next day. It was held that the telegraph company was negligent. *West. Un. Tel. Co. v. Pierce*, (Tex. Civ. App.), 70 S. W. 360.

A telegraph company may be held liable for failure to deliver a telegram, although the addressee lives beyond the free delivery limits, where it appears that the company undertook to transmit and deliver the message without extra compensation, and where it also appeared that the addressee might have been found within such free delivery limits by the use of reasonable diligence, although his place of residence may have been just beyond such limits. *West. Un. Tel. Co. v. Davis*, (Tex. Civ. App.), 71 S. W. 313.

g. Special contract for delivery.—Where a telegraph company undertakes for a special consideration to deliver a message four miles from the office of the company, it is bound by its undertaking although it may have been required to pay much more than the consideration received to employ a runner to make the special delivery. The making of such a special contract is within the scope of authority of the agent of a telegraph company. *West. Un. Tel. Co. v. Matthews*, 24 Ky. Law Rep. 3, 67 S. W. 849.

Where the sender of a telegram offered to pay the charges both for transmission and delivery, but the agent did not accept the money for delivery, because he did not know the amount to be charged therefor, it is proper to instruct the jury that unless the message was accepted under an agreement "that the charges of delivery should be collected at the place of delivery," the plaintiff could not recover. *Roche v. West. Un. Tel. Co.*, 24 Ky. Law Rep. 845, 70 S. W. 39.

A message informing the addressee of the dangerous illness of his son, sent under a special contract for its delivery at a distance of several miles from the company's office, must be delivered by the company in the exercise of such a degree of diligence as is commensurate with the importance of the message; the failure to make any effort to deliver the message is not excused by the fact that the addressee was absent from his home a good part of the day. *West. Un. Tel. Co. v. Hendricks*, 29 Tex. Civ. App. 413, 68 S. W. 720.

Where an agent with authority contracts with the sender of a telegram to immediately deliver a particularly urgent telegram, receiving an additional fee therefor, the company cannot be heard to say in answer to an action for damages caused by a delay in the delivery of such message, that its business was so conducted at the office to which such message was sent, that it was impracticable for it to comply with its contract. *West. Un. Tel. Co. v. Gavin*, 30 Tex. Civ. App. 152, 70 S. W. 229.

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Where a special contract was made by the sender of a telegram for its immediate delivery, and after the close of the office hours at the place of delivery, and an extra compensation was paid therefor, the company was held liable for its failure to deliver the telegram to the addressee, who resided within a few blocks of the company's office, notwithstanding it was received outside of office hours. *West. Un. Tel. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439.

5. Delay in delivery of telegram.

a. Contributory negligence of sender or addressee.—Where a message announcing the serious illness of the addressee's sister could have been delivered within fifteen minutes after its receipt, but was not delivered for three hours, before which time the last train left for the place where the sister resided, and where it appears that the addressee was physically unable to walk to where his sister lived, and could not obtain a team to drive there that night, a charge to the jury that there was no evidence of contributory negligence on the part of the plaintiff was proper. *Meadows v. West. Un. Tel. Co.*, 132 N. C. 40, 43 S. E. 512.

Where, in an action for damages for failure to deliver a telegram, the defendant contended that the plaintiff was guilty of contributory negligence, in not making further efforts to communicate with the addressee, evidence that the defendant's agent stated to the plaintiff that the telegram had been delivered was admissible to rebut the defense of contributory negligence. Where the sender of the telegram relies upon the representation made by an agent of the company that the message had been delivered, his failure to make further efforts to communicate with the addressee does not constitute contributory negligence as a matter of law. *West. Un. Tel. Co. v. Barefoot* (Tex. Civ. App.), 74 S. W. 560.

The question as to the negligence of the person to whom the message is addressed in making due effort to arrive at the bedside of a dying relative, is for the jury. *West. Un. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122.

A telegraph company is not authorized to depend solely on the address of a message for information as to the person to whom it is to be delivered, where, in the exercise of the care required by law, it could acquire more definite information. The sender of a telegram is not guilty of negligence contributing to the non-delivery of the telegram, by failing to furnish a definite address, where the address furnished was the fullest he could obtain by the exercise of reasonable care. *West. Un. Tel. Co. v. Bowen*, (Tex. Civ. App.), 76 S. W. 613.

Where delay has occurred in the delivery of a message announcing the fatal sickness of a person, and the recipient fails to arrive at the bedside of the person who was sick prior to his unconsciousness or death, and an action is brought to recover for the mental distress occasioned to the recipient of such message, no recovery can be had where it appears that the recipient of the message did not herself use due diligence in attempting to reach the bedside

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of the person who was sick. *West. Un. Tel. Co. v. Matthews*, 24 Ky. Law Rep. 3, 67 S. W. 849.

b. Recovery for mental anguish. (I.) IN GENERAL.—In Louisiana a recovery may be had against a telegraph company for failure to deliver a message to a mother announcing the mortal illness and approaching death of a son, based upon the mental anguish occasioned by the failure to deliver such message. *Graham v. West. Un. Tel. Co.*, 109 La. 1069, 34 So. 91. The court in this case said: "Mental pain and suffering as to their existence are certainly as actual, clear and positive as are intellectual enjoyment and gratification, and the former are as susceptible of being ascertained and gauged as are the latter. If a contracting party, by reason of a breach of contract, can be made legally responsible for damages on his part for the "mortification," or the loss of anticipated pleasure and enjoyment which his default has occasioned the other contracting party, or if a man who has used harrowing and insulting language to another, short of defamation, can be held legally to respond in money for the humiliation which he has caused the latter to suffer, no good reason can be assigned why mental pain and suffering could not and should not furnish equally, the basis for a judgment for damages. The existence of physical pain as the result of a bodily wound is a fact which every one knows and recognizes; but the extent of the pain no one but the sufferer himself can appreciate. The existence of mental suffering by a parent for the loss of a child is a fact so universal and general that it also may be fairly assumed and recognized as existing in any given case, in the absence of facts and circumstances tending to disprove the same. The question of the distress and sorrow may not be susceptible of direct or exact measurement, but enough certainty and knowledge of the situation can be established through the introduction of testimony to furnish the basis for a verdict or a judgment."

Where a telegraph company negligently failed to transmit a telegram calling a mother to a daughter's deathbed until after the only train had left on which the mother could have reached the daughter before her death, the mental anguish of the mother resulting therefrom was proximately caused by the negligence of the company. The liability of the company is not lessened by an agreement of the sender that such telegram might be sent the next morning, where such agreement was induced by the clerk's statement that it was impossible to send such message that evening. *West. Un. Tel. Co. v. Seffel* (Tex. Civ. App.), 71 S. W. 616.

Where a telegram is sent announcing the illness of the addressee's son, which could have been delivered in time for him to reach his son's bedside on the same day by taking a train soon after the receipt of the telegram at the office of the company, but because of the delay in the delivery of the telegram was unable to take a train so as to arrive there before the next day, the addressee of the telegram is entitled to damages for mental anguish occasioned by the delay in the delivery of such telegram. *West. Un. Tel. Co. v. Bolew* (Tex. Civ. App.), 74 S. W. 799.

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A message received by a telegraph company in the evening, under a contract for prompt delivery to the addressee, was transmitted the following morning, but not delivered until five o'clock in the evening, though proper diligence would have secured prompt delivery. The message apprised the plaintiff of the serious illness of her mother, and the delay prevented her from reaching her mother's bedside before her death. The company was held guilty of negligence which was the proximate cause of the plaintiff's mental anguish, for which a recovery of damages could be had. *West. Un. Tel. Co. v. Shaw*, (Tex. Civ. App.), 77 S. W. 433.

Where the plaintiff, in response to a telegram announcing his brother's death, delivered to the telegraph company a message asking what disposition should be made of the body, and the message was not sent, the plaintiff could not recover for mental anguish, as the company was not liable for a failure to send a message intended to relieve mental anguish then existing in the mind of the sender. *Sparkman v. West. Un. Tel. Co.*, 130 N. C. 447, 41 S. E. 881.

A statute providing that the telegraph company shall be liable in damages to the parties by an unreasonable delay in the delivery of a message authorizes an action in behalf of the sender of a message for mental anguish suffered by failure to deliver promptly a message from without the State to a place within the State. The liability of the company under such a statute is based upon the breach of a public duty and not of a private contract. *Gray v. West. Un. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, construing Shannon's Code, secs. 1837, 1838.

Where the evidence shows that the agent of a telegraph company to whom a message was given for transmission was informed that the purpose of the message was to have the person to whom it was addressed prepare a grave for the body of his deceased child, and to have his relatives meet him, recovery could be had for the mental distress suffered by the sender of the message because of a failure to deliver such message, and the consequent necessity of the plaintiff's waiting with his child's body in the freight warehouse until proper arrangements could be made for the interment. A verdict of \$750 was held not excessive under such circumstances. *West. Un. Tel. Co. v. Griffin*, 27 Tex. Civ. App. 306, 65 S. W. 661.

Exemplary damages are recoverable against a telegraph company by the sender of a death message, if, through the gross negligence of the agents of the company, such telegram is not delivered. *West. Un. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283.

There can be no recovery for mental suffering resulting from the failure of a telegraph company to deliver a message transmitting money to the addressee. The court, in considering this question, said: "This court is committed to the doctrine that a telegraph company is answerable in damages for mental suffering caused by its failure to deliver a social message, by reason of which the sender or person addressed is prevented from attending at the bedside, at the death, or at the funeral, of a near relative. We have not applied the doctrine, however, further than to the class of cases referred to, and then the liability has been restricted to those of the first

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degree of relationship." Other cases cited holding that the rule as to damages for mental anguish occasioned by a failure to deliver or a delay in the delivery of a telegram does not apply to mental suffering caused by the negligence in the delivery of a telegram transmitting money are: *DeVoegler v. West. Un. Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107; *Ricketts v. West. Un. Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105.

The sender of a telegram cannot recover for mental anguish caused by failure to deliver a telegram inquiring as to the physical condition of his child who had been sick, but was convalescent. *West. Un. Tel. Co. v. O'Callaghan*, (Tex. Civ. App.), 74 S. W. 798.

There can be no recovery for mental anguish caused by the failure of a telegraph company to deliver a telegram sent to a clergyman requesting him to attend a funeral, although it appeared that such clergyman was a friend of the family, which was known to the telegraph company, and through the negligence of the company it was necessary to secure another clergyman. *West. Un. Tel. Co. v. Arnold*, 96 Tex. 493, 73 S. W. 1043.

In an action to recover for mental anguish occasioned by a delay in the delivery of a telegram, whereby the plaintiff failed to reach the bedside of his mother before her death, evidence that before the mother died she made inquiries and requests with reference to the plaintiff, and kept calling for him, was inadmissible. *West. Un. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 761.

(II.) DEGREE OF RELATIONSHIP.—In cases where the damages are claimed for mental pain suffered by the sender of the message on account of the absence of the addressee resulting from the negligence of the telegraph company, a close and affectionate relation must exist between the sender, the addressee, and the person concerning whom the message is sent. The doctrine of recoverable damages on account of mental pain and suffering should not be extended to cases wherein there does not exist that close degree of relationship, such as parent and child, husband and wife, brother and sister, from which natural love and affection is presumed. So where a message is delayed in delivery announcing to the addressee, who is a brother-in-law of the sender, that the sender's daughter is dying, the sender cannot recover for mental anguish occasioned by the absence of his brother-in-law from the bedside of his child caused by such delay. *West. Un. Tel. Co. v. Ayers*. (Ala.), 31 So. 78.

The degree of relationship between a wife and her husband's uncle, where it appears that the uncle had stood in the place of a parent to both the husband and wife, is not so remote as to preclude the recovery of damages for mental anguish, caused by the failure of a telegraph company to deliver to the uncle a telegram sent by her announcing her husband's death. *Bright v. West. Un. Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

A telegram as follows: "Will Phillips' wife at point of death," and signed "Will Phillips," was held sufficient to charge the telegraph company with notice of its importance and the necessity for immediate delivery, though it

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did not indicate the relationship between the parties. *Meadows v. West. Un. Tel. Co.*, 132 N. C. 40, 43 S. E. 512.

(III.) SUFFICIENCY OF PLEADING.—A declaration alleged that had a message directed to the plaintiff, announcing the fatal sickness of a sister, been transmitted and delivered in a reasonable time, the plaintiff would have had ample time to have reached his sister's home, and attended her funeral services; that he never knew of the dying condition of his sister until the evening of the second day after the delivery of the telegram for transmission, when he learned that she was dead and buried, and that by the willful negligence and failure of the defendant's servants to transmit and deliver such message, the plaintiff was subject to great mental pain and anguish, in consequence of his being deprived of the privilege of attending the burial and funeral of his dead sister, sufficiently states a cause of action. *Hartzog v. West. Un. Tel. Co.* (Miss.), 34 So. 361.

(IV.) SOUTH CAROLINA STATUTE; INTENTIONAL WRONG.—The South Carolina act of 1901 (page 748), provides that telegraph companies shall be liable in damages for mental anguish or suffering even in the absence of bodily injury for negligence in receiving, transmitting, or delivering messages, and further provides that nothing in the act shall abridge existing rights or remedies, but shall be in addition thereto. Under such statute a telegraph company may be made liable for physical injuries directly and proximately caused by its negligence, and damages may be recovered from it for intentional wrongs in failing to transmit or deliver messages. These rights exist independent of the statute and are not affected thereby. *Marsh v. West. Un. Tel. Co.* (S. C.), 43 S. E. 953. Where a messenger boy intentionally fails to deliver a telegram the addressee is entitled to punitive damages. *Butler v. West. Un. Tel. Co.*, 65 S. C. 510, 44 S. E. 91.

Such statute is not in violation of the 14th amendment of the United States Constitution as class legislation; nor is such act violative of article 1, section 5 of the State Constitution, in that it deprives telegraph companies of the full protection of the law. *Simmons v. West. Un. Tel. Co.*, 63 S. C. 425, 41 S. E. 521.

(V.) NEGLIGENCE OF TELEGRAPH COMPANY AS PROXIMATE CAUSE.—A message announcing to the addressee the death of his mother was delayed in delivery so that at the time of its delivery the only train which he could have taken to reach his mother's residence and attend the funeral was scheduled to leave at once. He telephoned to the railroad station, and being erroneously informed that the train was on time, made no effort to take it. It appeared, however, that the train was late and that if he had been correctly informed, he could easily have taken it. In an action brought against the telegraph company for negligence in delaying a delivery of the message it was held that the jury should have been instructed that if the plaintiff was misinformed as to the time when the train left, that the defendant's negligence, if any, was not the proximate cause of the plaintiff's injury, and no damage could be assessed for mental anguish caused by the plaintiff's failure to

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attend his mother's funeral. *Higdon v. West. Un. Tel. Co.*, 132 N. C. 726, 44 S. E. 558.

A message announcing to the sendee the injury of his wife in a storm and stating that his wife was hurt, but not dangerously hurt, which was intended to relieve him of his anxiety upon learning of the storm and loss of life occasioned by the storm, was delayed in its delivery by the negligence of the defendant telegraph company. It appeared that the plaintiff had no knowledge of the nature of the storm until many hours after the delivery of the message. If the message had been promptly delivered he could have reached the bedside of his wife fourteen hours prior to the time when he did. It was held that the negligence of the telegraph company was not the proximate cause of the plaintiff's mental anguish from the time the message was received by him until he reached the bedside of his wife, and that there could not, therefore, be a recovery against the company. *Gaddis v. West. Un. Tel. Co.* (Tex. Civ. App.), 77 S. W. 37.

A telegram was received by the plaintiff announcing the dangerous illness of her brother. Subsequently another message was sent announcing her brother's death, and that he had died of a contagious disease, and directing her not to come. Owing to a delay in the delivery of the second message she, with her young baby, proceeded by train to her brother's home. When she had reached her destination she was informed of the nature of her brother's disease and was compelled to wait outside in the cold and rain for a carriage to take her and her baby to the station. She sought to recover damages for the mental anguish due to the worry over the exposure of her child. The court held that the damages caused by her waiting and the consequent exposure, and the fear of the effect upon the health of her child, were too remote. *West. Un. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

(VI.) WILLFUL DISREGARD OF DUTY.—Where a telegram announcing the death of the addressee's husband was not delivered, and an action was brought to recover for mental anguish occasioned by the company's negligence, evidence showing that the addressee's sons called at the telegraph office on the day it was sent, and on the succeeding day, and were informed that there was no telegram, and that no attempt was made to find the addressee after it was discovered that she lived six or seven miles in the country, is sufficient to sustain a finding that the company had willfully disregarded the rights of the addressee, and warranted exemplary damages. *West. Un. Tel. Co. v. Watson* (Miss.), 33 So. 76.

Where, owing to the negligence of a telegraph company, a telegram sent by the father of a four year old boy to the grandmother of the child was not delivered, and she failed to reach the sender's home before the child's death, the parties were so related that, in an action by the sender damages for mental anguish might be recovered. *West. Un. Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. 45.

(VII.) WHAT LAW GOVERNS.—Where a message was sent from Arkansas to a person sojourning in Texas, and such person suffered mental anguish because of the failure to deliver such message, he can recover damages there-

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for in Texas, although mental anguish is not recognized as an element of damages in Arkansas. *West. Un. Tel. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526.

The law of Texas governs the case where the message was tendered in Indian Territory for transmission to Texas. *West. Un. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427; *West. Un. Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751.

A telegraph company in Texas is liable for damages for mental suffering resulting from its negligence in failing to deliver promptly a message sent from there to a non-resident plaintiff, although the jurisdiction in which the plaintiff resides does not authorize recovery in such cases. *West. Un. Tel. Co. v. Anderson* (Tex. Civ. App.), 78 S. W. 34.

(VIII.) EXCESSIVE DAMAGES.—A verdict of \$1,500 is excessive where by delay in the delivery of the message the plaintiff was prevented from being with her father during the last hours of his life, during all of which period he was unconscious, and the message arrived in time to allow her to be present at the funeral; such verdict should be reduced to \$500. *West. Un. Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23, 67 S. W. 159.

c. *Recovery for mental anguish not allowed.*—An action cannot be maintained at common law to recover for unreasonable delay in the delivery of a death telegram where the only damages alleged or proved was mental suffering not accompanied by any pecuniary loss or physical injury. *West. Un. Tel. Co. v. Sklar*, 126 Fed. 295 (Circuit Court of Appeals, Sixth Circuit). The court in its opinion emphatically declares against the doctrine as laid down in the cases decided under the statutes in Texas and Tennessee, and holds that there can be no recovery of damages for mental anguish occasioned by the negligence of a telegraph company in the transmission or delivery of telegrams. We quote the following from the opinion in this case:

"The very great weight of opinion is against the view of this question entertained by the Tennessee court, and we feel ourselves constrained to hold that damages for mental suffering or injury to the feelings are not recoverable in either an independent action nor as additional damages when the plaintiff has averred and shown some pecuniary damages. Damages for mental pain, grief, disappointment, etc., are recoverable at common law only when the inseparable accompaniment and result of some bodily pain. The question has been so frequently discussed in so many courts that we do not feel justified in repeating the reasoning upon which this conclusion rests. Whenever the question has been decided in any Federal court, the doctrine of the Texas and Tennessee cases has been repudiated as not sustained by the principles of the common law. *Chase v. W. U. Tel. Co.* (C. C.), 44 Fed. 554, 10 L. R. A. 464; *Crawson v. W. U. Tel. Co.* (C. C.), 47 Fed. 544; *Wilcox v. R. & D. Rd. Co.*, 52 Fed. 264; 3 C. C. A. 73, 17 L. R. A. 804; *Tyler v. W. U. Tel. Co.* (C. C.), 54 Fed. 634; *Kester v. W. U. Tel. Co.* (C. C.), 55 Fed. 603; *W. U. Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Gahan v. W. U. Tel. Co.* (C. C.), 59 Fed. 433; *Chicago, etc., Ry. Co. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552. In addition to these cases from the Federal

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courts we cite but a few of the leading decisions from English and State Supreme Courts. *W. U. Tel. Co. v. Roberts*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Chapman v. W. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Morton v. W. U. Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648; *W. U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Connell v. W. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Mitchell v. Rochester, etc., Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *West v. W. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Lynch v. Knight*, 9 House of Lords Cases, 577; *Railway Com'rs v. Coultas*, L. R., 13 App. Cases, 222."

Under the Virginia statute it has also been held in the United States Circuit Court for the Eastern District of Virginia, in the case of *Alexander v. West. Un. Tel. Co.*, 126 Fed. 445, that an action cannot be maintained against a telegraph company for the recovery of damages consisting of mental anguish alone, caused by delay in delivering a death message, either under the Virginia statute (Acts, 1899-1900, p. 724), providing for the recovery of damages for delay in the delivery of a telegraph message, or independent of such act. See, also, *Connelly v. West. Un. Tel. Co.*, 100 Va. 51, 40 S. E. 618.

Damages for mental anguish occasioned by a defendant telegraph company's delay in delivering a message cannot be recovered in an action in tort unless there are other damages resulting from the negligence. *West. Un. Tel. Co. v. Brooker* (Ala.), 35 So. 468.

In Indiana the rule is declared that where, through delay in delivering a telegram, the addressee was deprived of the opportunity of attending the funeral of a near relative, and suffered neither pecuniary nor bodily injury, he could not recover for the mental anguish occasioned by the telegraph company's negligence. *West. Un. Tel. Co. v. Adams*, 28 Ind. App. 420, 63 N. E. 125, citing *West. Un. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 675.

d. Message to physician requiring services.—A telegram delivered to a telegraph company for transmission to a physician in the following language: "Come to L. C. Church's at once," is sufficient to charge the company with knowledge that the telegram was urgent, and required reasonable promptness in its delivery, where it appeared that the professional character of the addressee was well known to the agents of the company at both the sending and receiving offices. Damages may be recovered against the telegraph company for failure to deliver such a message for the increased physical and mental suffering of the patient caused by the non-attendance of the physician. *West. Un. Tel. Co. v. Church* (Neb.), 90 N. W. 878.

A father can recover damages for increased mental anguish incurred from witnessing the suffering of his sick child, when such increased suffering was occasioned by the negligent failure of the telegraph company to promptly deliver a message addressed by the parent to a physician directing him to come to the sick child at once. *West. Un. Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229.

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c. *Non-delivery of social messages.*—Neither substantial nor punitive damages will be allowed for the non-delivery of social telegrams. *West. Un. Tel. Co. v. Cross' Adm'r* (Ky. Ct. App.), 76 S. W. 162.

f. *Commercial messages.* (I.) GENERAL RULE.—A telegraph company receiving for transmission over its lines a message agrees to transmit and deliver the same to the sendee with reasonable promptness, and is liable for such proximate damages as may occur from its failure to do so. It is not, however, liable for damages that are not traceable to and resultant from an unreasonable delay in the transmission and delivery of such message, and which would have resulted had no such delay occurred. *West. Un. Tel. Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839.

(II.) LIABILITY FOR DAMAGES.—A statute providing that a telegraph company shall be liable for all damages occasioned by the negligence of their operators in receiving, copying and transmitting or delivering messages, does not render telegraph companies liable for damages other than the proximate result of its negligence. So where an acceptance of an offer for the sale of tobacco was wired on condition that the sendee pay for sampling and asking an answer; and where the sendee answered by refusing to pay for sampling, and the latter message was not promptly delivered, by reason of which no contract was made and the tobacco was sold to others, it was held that since the telegram which was delayed constituted a purported termination of the negotiations then pending, the plaintiff's loss by reason of a contract which he might subsequently have made was not the proximate result of the delay and could not be recovered. *Fisher v. West. Un. Tel. Co.*, (Wis.), 96 N. W. 545.

The plaintiff and another had negotiated by correspondence for the purchase of a number of head of cattle. The plaintiff offered a certain price for the cattle. Subsequently the offer was accepted by telegram. The contents of the telegram indicated that time was an essential element in the contract. The defendant telegraph company neglected to transmit and deliver the telegram because of which the cattle were sold to another person and the plaintiff sought to recover for damages occasioned to him by his failure thereby to consummate the sale. It was held that the defendant telegraph company was liable. *West. Un. Tel. Co. v. Snow* (Tex. Civ. App.), 72 S. W. 250.

Where the negligent delay of a telegraph company in the delivery of a message delivered to it for transmission by the plaintiff, results in the loss to the plaintiff of a sale of a quantity of corn at a price above the market value of the corn at the time and place it would have been delivered, had such sale been made, the measure of damages is the difference in value between the price the plaintiff would have received for the corn had the sale been made, and the market value of the corn at such time and place of delivery, unaffected by the price at which the plaintiff may have disposed of the corn after that time. *West. Un. Tel. Co. v. Nye & Sohnsider Grain Co.*, (Neb.), 97 N. W. 305.

Where a telegraph company accepts a message relating to the sale of a valuable horse, for which an offer has been made, and fails to deliver a written

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copy of the message to the person for whom it was intended, although his residence is within the delivery circle of the defendant, but on the contrary sends the message by telephone to the wife of a rival horse dealer, who leaves it exposed in the public office of a hotel where horse dealers congregate, and it is alleged that from the publicity thus given the sale is defeated, with loss to the sender, the question of negligence and consequent injury are for the jury. *Bornes v. West. Un. Tel. Co.*, 120 Fed. 550 (Circuit Court, Georgia Southern District).

An agreement was made between the plaintiff and a distiller whereby the distiller was to receive money from the plaintiff to purchase stamps to be affixed to packages containing certain spirits. It was agreed that the distiller should return the money when the liquor was sold. The plaintiff, in pursuance of such an agreement, gave his check for the amount to a third person for him to purchase the stamps. Before such person arrived at his destination the plaintiff telegraphed the president of the bank on which the check was drawn to tell the third person not to purchase the stamps as facts had transpired which rendered the spirits liable to seizure; but the telegram did not reach the third person in time to prevent purchase of the stamps. It was held that there was a completed loan and not merely an agreement therefor between the plaintiff and the distiller, and that, therefore, the telegraph company was not liable for negligence in failing to deliver the message. *Salmons v. West. Un. Tel. Co.*, 133 N. C. 541, 45 S. E. 896.

The plaintiff delivered to the defendant telegraph company a message in the following language:

"Rush.

Ogden, Utah, September 24, 1900.

R. S. Brooks, Green River, Wyo.

Searcy arrives Green River 3 a. m.; did not get anything Idaho.

B. B. Brooks."

On the day before the following message was also sent:

"R. S. Brooks, Green River, Wyo.

Searcy there Monday noon or Tuesday morning sure. Get letters. H.

Engenoen wants buy. Meet you. Price 11.

B. B. Brooks."

Neither of these messages were transmitted, because of which the addressee failed to meet the person mentioned therein to whom a large number of horses were to be sold at an agreed price. In an action for damages caused by the failure to transmit such messages it was held that the messages were sufficient to put the telegraph company on inquiry as to their importance, and hence authorized a recovery. The measure of damages was the difference between the amount which he would have received for the property if the messages had been delivered, and the amount which he did receive on disposing of such property after using due diligence to obtain the highest price which could be had under the circumstances; it is not sufficient to base the damages upon the difference between the price which would have been re-

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ceived and the price which was actually received, unless it is shown by evidence that the price at which the property was sold was the highest price that could have been received under the circumstances by the use of reasonable diligence. The stipulation printed on the back of a blank used by a telegraph company in receiving a message, that the company should be liable only for a certain sum as damages caused by a failure to deliver an unrepeatable message, could not limit the company's liability for damages caused by its negligent failure to transmit the message. *Brooks v. West. Un. Tel. Co.*, (Utah), 72 Pac. 499.

A telegraphic message purporting on its face a proposal to sell lumber is sufficient of itself to charge the telegraph company with notice of its importance so as to call for prompt transmission and delivery. In answer to a telegram to a lumber company asking whether it could furnish certain lumber and at what price, a reply telegram that it could furnish it at a certain price was delivered to a telegraph company for transmission, but was either never sent, or never delivered. In an action for damages by the lumber company against the telegraph company, the measure of damages is not the difference between the cost of the lumber delivered at the point of delivery and the fixed price, but the difference between such price and the market value of the lumber at the time when delivery would have been made if the contract had been consummated. *Beatty Lumber Co. v. West. Un. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

(III.) DAMAGES TOO REMOTE AND UNCERTAIN.—Where, by the delay in the delivery of a telegram, the addressee failed of an opportunity to bid for a railroad contract, which he might have made or might not have made, and the profits on which contract, if made, would have been subject to several contingencies, no recovery of damages can be had because they do not arise necessarily from the delay in the delivery of the telegram, and because they are uncertain and too remote. *Johnson v. West. Un. Tel. Co.*, 79 Miss. 58, 29 So. 787.

Recovery cannot be had of damages accruing for failure to deliver a message requesting the addressee to come to a certain place and make a bid for the construction of a number of houses, since there was nothing to indicate that the parties could have come to terms and the amount of the damages was entirely contingent upon the acceptance of the plaintiff's bid. *Harmon v. West. Un. Tel. Co.*, 65 S. C. 490, 43 S. E. 959.

(IV.) DAMAGES OCCASIONED BY LOSS OF POSITION.—Where a telegraph company was negligent in transmitting and delivering a telegram and the sender of such telegram thereby failed to secure a position as a teacher, it was held that the company was liable for damages occasioned by the loss of the position; it was, however, too remote to allow as an element in the determination of damages the worry caused to the sender by the loss of such position. *West. Un. Tel. Co. v. Partlow* (Tex. Civ. App.), 71 S. W. 584.

(V.) MESSAGE IN RESPECT TO ILLEGAL TRANSACTION.—Where, in an action for failure to deliver a telegram as sent, directing the purchase of cotton, the company defends on the ground that the dispatch related to an illegal

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dealing in futures, the burden is on the defendant to show that the cotton could not and would not have been delivered. *West. Un. Tel. Co. v. Hill*, (Tex. Civ. App.), 65 S. W. 1123.

g. Notice by telegram of sanction of the court of a writ or certiorari.—Where the attorney at law for the plaintiff in *certiorari* proceedings contracts with a telegraph company for the sending of a message giving notice of the sanction of the writ, and of the time and place of hearing, directed to the defendant, and the company fails to deliver such message within the time agreed upon, and in consequence the *certiorari* is dismissed for want of such notice, and where the attorney, after having paid his client the amount involved in the *certiorari* proceeding, sues the company for the non-delivery of the message, such attorney occupies the position of the plaintiff, and it is incumbent upon him to show that he would have succeeded in the *certiorari* proceeding and was damaged by its dismissal. Where the evidence failed to show that the attorney could have so succeeded but that he paid his client under what he thought was a moral obligation, the finding of the jury in his favor was contrary to law and should be set aside. *West. Un. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89.

6. Error in transmission.

a. As to social message.—A message was delivered to a telegraph company directed to the plaintiff, requesting him to come home as "Ira" was sick, but in transmission the name was changed to "Car." On receipt of the message the plaintiff requested the receiving operator to wire the office receiving the telegram and ask if the message was correct, and was shortly afterwards informed that such office said the message was correct. The plaintiff had a child named Ira and a nephew named Carl living next door, and thinking that it was the nephew who was sick, the plaintiff did not return home until after receiving a message the next day that his child was dead. It was held that the defendant was liable for its negligence, and that the plaintiff was not precluded from recovery because of his contributory negligence. *Efird v. West. Un. Tel. Co.*, 132 N. C. 267, 43 S. E. 825.

b. In transmission of commercial message.—A telegraph company which receives a message for transmission agrees to transmit it accurately and is answerable for any damage produced by its delay or mistake, if the loss was one which was either expressly contracted against, or was within the expectation of the sender and the telegraph company, as likely to result if delay or mistake occurred. (Citing *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Milson v. Telegraph Co.*, 72 Mo. App. 111). The doctrine is that the telegram, which on its face relates to a business transaction, apprises the telegraph company of the importance of conveying it accurately, and that damage is likely to ensue from a failure to do so. (Citing *Lee v. Telegraph Co.*, 51 Md. App. 375; *Bierhaus v. Telegraph Co.*, 8 Ind. App. 246, 34 N. E. 581; *Parks v. Telegraph Co.*, 13 Cal. 422, 73 Am. Dec. 589.) But conceding such propositions of law, it is notwithstanding true that no person can be mulcted in more than nominal damages for a breach of contract unless the breach caused substantial damage. These principles were applied in the case of

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Strahorn-Hutton-Evans Commission Co. v. W. U. Tel. Co. (Mo. App.), 74 S. W. 876. In this case the facts were as follows: A certain person had executed a deed of trust in the nature of a chattel mortgage on his cattle to the plaintiff, which prohibited him from making any sales of such cattle except through the plaintiff; such person was permitted, however, to sell certain cattle to other persons and account for the proceeds; on a subsequent shipment having been made by such person to others, the plaintiff telegraphed him to ship no more cattle covered by their mortgage except to them, and directed him to instruct the consignees of the cattle last shipped to pay "net proceeds" to the plaintiff. As delivered the message substituted the word "no" for the word "net" so that the sense of the dispatch was that the New Orleans firm should pay "no proceeds" on the cattle instead of "net proceeds" to the plaintiff. As a result of such mistake it was alleged the plaintiff suffered loss through the addressee's taking and appropriating to his own use the proceeds of the sale of the cattle. It was held that the telegram as transmitted and delivered to the addressee did not warrant him in believing that the sender intended that he should appropriate such proceeds to his own use, and that therefore the error was not the proximate cause of the plaintiff's loss.

Where one requests another to make an offer for the sale of an article and the offer is made by telegraph and the telegram as delivered to the addressee is materially different from the telegram delivered for transmission, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee, and may recover from the telegraph company any damages which he has sustained in fulfilling a contract resulting from an acceptance of such proposal. *Western Union Tel. Co. v. Flint, River Lumber Co.*, 114 Ga. 576, 40 S. E. 815.

The sender of a telegraphic message delivered to the telegraph company a message agreeing to furnish oranges at \$2.60 a box; the message as transmitted read, \$1.60 a box; the sendee of the message, with full knowledge of the fact that the message must have been erroneously transmitted, accepted the offer at the price stated; the sender of the telegram, disregarding the apparent error, saw fit to treat the price stated in the telegram as correct, and shipped the oranges at such price and sued the telegraph company for the difference between such price and the price stated in the telegram as delivered by him to the telegraph company. It was held that the telegraph company was not liable since, from the facts, it appeared that the contract itself was not valid. *Germain Fruit Co. v. Western Union Tel Co.*, 137 Cal. 598, 70 Pac. 658.

An allegation that the defendant telegraph company had received a second message, and with knowledge of the facts, agreed to transmit it for the purpose of revoking or modifying an earlier message received by it for immediate transmission, and had willfully, carelessly and negligently neglected to send the first message at once, and delivered the last message first, whereby the first revoked the last, in violation of the defendant's undertaking, sufficiently alleges negligence on the part of the defendant. Where the object

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of the second message is explained to the telegraph company receiving it for transmission, and the company contracts that such message shall be so transmitted and delivered as to accomplish the desired result, the sender is not, by his failure to make the messages show on their face which is later, guilty of such negligence as to bar recovery for damages sustained by the defendant's neglect. *Hocker v. Western Union Tel. Co.* (Fla.), 34 So. 901.

c. *Cipher messages*.—A telegraph company receiving a message which is partly in cipher, having knowledge that similar messages received at other times were usually "rush" messages, the company was sufficiently apprised of the importance of the message, notwithstanding the fact that it was partly in cipher, and was responsible for the actual damages caused by the failure to promptly transmit the message. *Western Un. Tel. Co. v. Birge Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181.

Where an error is made in the transmission of a message from the State of Massachusetts to a place in the State of Mississippi the statutes of the State of Massachusetts control as to the liability of the company for damages arising from such error. Under the Massachusetts statute it has been held that a regulation requiring the payment of an additional rate to insure accuracy in transmission is reasonable. Where a message in cipher was transmitted and no additional rate was paid to insure accuracy, the rule controlling such cases in Massachusetts will be applied in an action brought in Mississippi to secure damages for the erroneous transmission of such message. *Shaw v. Postal Telegraph-Cable Co.*, 79 Miss. 670, 31 So. 222.

d. *Message from without the State*.—The plaintiff, engaged in business within the State, received a telegram from his agent without the State, submitting an offer for cotton, which was negligently transmitted so that the offer as received was greater than that as sent. The plaintiff accepted the offer and shipped the cotton. It was held that the telegraph company was liable for the damages in the same manner and to the same extent as though the tort were committed within the State. *Postal Telegraph-Cable Co. v. Wells* (Miss.), 35 So. 190.

7. *Liability for forged or fraudulent messages*.—A telegraph company is liable to a bank for the loss occasioned by payment of money without negligence on a message purporting to have been sent by another bank, but which was in fact concocted and forged by an operator employed by the telegraph company whose duty it was to send messages, and who sent such message in the usual manner over the company's lines, and through its regular agents. In such case the act of the operator in sending the false message, although criminal, and unauthorized by the company, was within the apparent scope of his employment, and if the message had been genuine would have been within his actual authority, and it was only by reason of such authority that he was enabled to consummate the fraud. His act was also a violation of the duty which the company owed to the public and third persons to transmit only genuine messages. *Pacific Postal Tel. Co. v. Bank of Palo Alto*, 109 Fed. 369 (Circuit Court of Appeal, Ninth Circuit).

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An operator in the employ of a telegraph company informed a person as to the "call" of another place and also informed him as to the signature which he used to messages transmitted by him. Such person, when thus informed, fraudulently tapped the wires of the telegraph company and messages were thus sent by him to a confederate in the other place and through such messages a bank in the latter place cashed a draft, and was thus defrauded of the amount thereof. In an action brought by the bank against the telegraph company it was held that the evidence was sufficient to justify a finding that the telegraph company was guilty of negligence, and was therefore liable to the bank for the amount of the draft. *Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.), 72 S. W. 232; aff'd. 77 S. W. 603.

Where the agent of a telegraph company willfully sent a false and forged dispatch to an unmarried man purporting to be signed by an unmarried woman with whom he had a casual acquaintance, requesting him to meet her at a certain town, and afterwards exhibited the telegram, and boasted of having sent it, the act was within the scope of the agent's employment, so that the telegraph company was liable for damages arising from the mental suffering caused by injury to the woman's reputation. *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 31 So. 206.

8. Contract between sender and telegraph company.—The addressee of a telegraph message is bound by the reasonable terms of the contract made between the company and the sender of the message. Where a message is delivered to a company for transmission on the blank form of another company, the blank containing printed instructions that the message shall be sent subject to the terms and conditions printed on the back thereof, the reasonable conditions therein set out are binding, notwithstanding they are in the form of a contract with a company other than the one to which the message is delivered. The delivery and acceptance of such a message is, in effect, an adoption by the parties of the blank contract made in the name of the other company. *Western Union Tel. Co. v. Waelbaum*, 113 Ga. 1017, 39 S. E. 443.

9. Office hours on Sunday.—Where it appeared that the office hours of a telegraph office on Sunday were from eight to ten in the morning and four to six in the afternoon, and a message was received to be delivered to the person to whom it was directed residing less than half a mile from the office, during the closed hours of the office, the failure of the agent to deliver the message until twenty minutes after the hour of opening, was not negligence for which the addressee of the message could recover, although if the message had been immediately delivered after the opening of the office he would have been enabled to take a train as directed by the message. *Western Union Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610, 66 S. W. 592.

10. Reasonableness of rule not to deliver messages at night.—A telegraph company has the right to establish reasonable hour during which its office shall be kept open for the transmission and delivery of messages. Where it is shown that a place where the office of a telegraph company is located

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is not large enough to justify the employment of a special messenger, to deliver telegrams received after seven in the evening, a rule not to deliver messages so received until the next morning is not unreasonable. *Davis v. Western Union Tel. Co.*, Ky. Lak Rep., 66 S. W. 17.

11. Notice of claim for damages.—The requirement in a contract for the transmission and delivery of a telegraphic message that ninety days' notice of a claim for damages caused by the negligence of the company shall be filed with the company, does not preclude the recovery of damages where the action therefor is brought within ninety days after the cause of action accrued. *Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W. 63.

PART IX.

MISCELLANEOUS.

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CASSADY V. OLD COLONY STREET RAILWAY CO.

Massachusetts; Supreme Judicial Court.

1. **BURNING OUT OF A FUSE; NEGLIGENCE.**—A fuse as used in the machinery connected with an electric car is a safety device to prevent injury to the electric mechanism arising from variation in the electric current. The fuse is expected to burn out when, for any cause, the electric current exceeds the carrying capacity of the mechanism. When, therefore, a fuse burns out it is not *prima facie* evidence of negligence.
2. **LOCATION OF FUSE-BOX.**—While the mere burning out of a fuse properly located and in proper condition does not import negligence, yet if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers, and, therefore, upon this question the plaintiff had a right to go to the jury.
3. **DOCTRINE OF RES IPSA LOQUITUR.**—Where the evidence warrants a conclusion that the intensity and duration of the flame caused by the explosion was greatly in excess of what would have been the result if the fuse had been in proper condition, and that its imperfect condition might have been discovered by the use of reasonable care, the defendant is not entitled to a ruling to the effect that the doctrine of *res ipsa loquitur* does not apply. It was proper to instruct the jury that the matter was before them to decide how far negligence could be inferred from the accident itself.
4. **PRESUMPTION AS TO CAUSE.**—If the cause of the accident does not clearly appear from the evidence, or if there is a dispute as to what it is, the plaintiff may argue upon the whole evidence, and the jury may rely upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it.

Exceptions by defendant from judgment for plaintiff. Decided September 3, 1903; reported 1 St. Ry. 331, 68 N. E. 10.

Geo. R. Swasey and Thos. H. Buttner, for plaintiff.

Henry F. Hurlburt and Damon E. Hall, for defendant.

Opinion by HAMMOND, J.:

The first ground of defense is that there was no evidence of negligence of the defendant. It is conceded that the fuse burned out,

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but the defendant contends that the burning out of a fuse is not negligence *per se*, nor does it import negligence. The box containing the fuse was fastened to the sill of the open car, at a place directly underneath the portion of the seat upon which Mrs. Cassady was sitting. A fuse consists of a piece of metallic alloy, similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the "terminals," and they are so cut that they can easily be slipped under the thumb screws and clamped in place. The fuse and thumb-screws are held in what is called the "fuse-box." A wire leading from one thumb screw up through the roof of the car to the trolley wire conducts the electricity from the trolley wire to the box. From the other thumb screw there is a wire leading to the motors. When the two screws are connected by the fuse there is a direct path for the electricity from the trolley wire to the motors. The purpose in using the fuse is to protect the wiring and the motors from an excessive current of electricity. It is constructed to withstand something less than the maximum current which the wires and motors are capable of carrying. When the current of electricity exceeds the maximum strength of the fuse, the metallic alloy melts with more or less of a report and flame, and, the electrical path between the trolley wire and motors being thereby broken, the wire and motor are saved from possible harm. As the safety-valve in a locomotive engine allows the escape of steam when the pressure is too strong for safety or for the ordinary operation of the engine, so in electric cars the fuse is used to prevent the electrical mechanism from injury which might otherwise arise from the variations in the electrical current, which are practically unavoidable in the operation of the trolley cars.

A fuse of the character above described is in general use upon cars run by electrical power. It is a safety device, and the evidence in this case shows that, in view of the rapid action of electricity, the practical difficulty of controlling it at all times, the inability of the motorman to ascertain the amount of power upon the wires or on the motors, the variable weight of the load to be carried, the reasonably necessary conditions of the traffic as to weight of ma-

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chinery and cost of transportation, it is a proper device. It is intended to prevent harm to the machinery which otherwise might result from the practically unavoidable fluctuations of the power. The fuse is expected to burn out when, for any cause, the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped such an event is liable often to happen without negligence upon the part of any one. When, therefore, a fuse burns out, it cannot be said that the connection between the occurrence and negligence is such as, in the absence of other evidence, to justify the conclusion that the result was due to negligence. As well might it be said that the escape of steam from the safety-valve of a locomotive engine momentarily stopping at a station is evidence of negligence. The ordinary burning out of a fuse, therefore, is not *prima facie* evidence of negligence; and, if there had been nothing else in this case, the defendant would have been entitled to a verdict.

But the jury may properly have found that there was something else in this case. The expert evidence on both sides showed that the report, flash, and vapor-like puff attendant upon the burning out of a fuse like this when in proper condition are instantaneous and harmless, and no physical injury, either by burning or by an electrical shock, could be expected to result therefrom. The evidence for the plaintiff tended, however, to show something more than a mere instantaneous, harmless flash. Upon this Mrs. Cassidy testified as follows: "I was sitting on the car, and all at once a large flame of fire, or a blaze, came all over me, and I sprang off my seat, and started to go out of the car on the other side of the car, and a lady prevented me, and pushed me back, and that's the last I remember until about three weeks afterward, when I found myself in bed." Her daughter, who was seated a few seats in the rear of the one upon which her mother sat, testified that she "saw a flash of fire come into the car right over her mother, on the left-hand side; and she sprang away from it. . . . The flame seemed to come up and over her—to come from under the seat. The duration of the flame was a few seconds." She could not tell how long it lasted, but

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it was long enough for her "to see it plainly come in the car and flash right over" her mother. "The flame only partly enveloped" the person of her mother. "I should say it came over half of her face and body." Again, she says, "As the car started up the hill, there was this flash and flame." "I saw this flash and flame come up around or near my mother." Henry O. Rideout, a witness called by the plaintiff, testified that at the time of the accident he was driving a two-seated carryall, and that he "saw a flame and smoke come out of the car ahead." He continued: "It might have been a flame of three or four seconds duration. It came up over the side of the car. Seemed to come from underneath, I don't know where. I was too far away to tell. . . . I was probably a hundred yards behind the car at the time. I was on the same side of the car that the flame was. . . . I noticed the flame more than I did the smoke. I can't say from where I was, whether the flame went inside or within the car." Henry A. Rideout, another witness called by the plaintiff, testified that he was the father of the preceding witness, and at the time of the accident was driving in a team ahead of his son; and continued: "I saw a flash of light. . . . The car was ahead of me. I was driving toward it, and was about the length of this room from it. I simply saw a flash of light, and then I had to attend to my horse. . . . It was quite a flash of light come out near the front end of the car, I thought. My horse saw it, and, of course, shied, and I had to pay more attention to the horse." "I don't recollect seeing any smoke." As to the witnesses called by the defendant, one Thompson testified that he was sitting directly opposite the female plaintiff; and continued: "As the car was going, the fuse blew out. . . . There was a kind of a puff, and there was some smoke kind of come into the car. Looked to me like smoke. Everybody jumped. I jumped. There was this smoke, and, I suppose, flame, together; but I didn't notice much flame." On cross-examination he said: "My clothing was not burned, and I never told anybody that it was. It might have been scorched. I smelled the scorch of it." One Hunt, who was seated by the side of the preceding witness, did not notice any smoke, vapor, or flame. The conductor of the car testified that at the time he was standing

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on the running-board on the right-hand side of the car, at about the fifth seat from the front, collecting fares; heard a slight noise; did not turn around instantly, but soon turned, and saw no flame, but only "a slight vapor." One McPhee testified that he was about 400 or 500 feet behind the car at the time the fuse burned out. The first thing which attracted his attention was the stopping of the car, and he saw no flash or flame. So much as to the testimony of the witnesses as to what they saw at the time.

There was evidence also tending to show that the flame existed long enough to burn. The jury may have believed that holes were made by the flame in the veil worn by Mrs. Cassady at the time of the accident. The daughter testified that she went to her mother while in the car immediately after the accident, and that she then noticed that little red blotches were breaking out all over her mother's face; that, while bathing her mother's face a few hours afterward at home, she noticed a "fine red mark about an inch or an inch and a half long," near her mother's left eye, and that her eyebrows appeared as if they had been "scorched or burned off," and that there was a very slight appearance of scorching of hair elsewhere near the face. Margaret Pierce, called by the plaintiff, testified to the existence of "red marks or spots" on the left side of the eye, and just above the eye, and to the scorched appearance of the eyebrows and hair. The evidence as to these spots and marks was confirmed by several other witnesses. The plaintiff contended that these holes in the veil, these spots and marks upon the face, and this scorching of the eyebrows and hair were caused by the flame. It is true that the expert testimony for the defense tended to show that there could have been no such flame, and hence that there could have been no such burning; but an irreconcilable conflict between what eye-witnesses say they saw and what expert witnesses say could not have happened is not unusual in the trial of causes, and within reasonable limits the jury may decide upon which they will rely. The jury, upon the evidence, may have found that the flame in this case was not the instantaneous and harmless flame which results from the burning out of a fuse when in proper condition; that the burn-

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ing of this fuse was attended with unusual results, which would not have occurred if the fuse had been in proper condition; and that the most reasonable conclusion was that, if proper care had been exercised, there would have been no such flame. We cannot say that such a conclusion was not warranted by the evidence.

Moreover, there is another feature in this case of some importance. This was an open car, and this fuse-box was placed directly under a seat intended for passengers, so that if, for any reason, there should be a harmful flame resulting from the burning out of a fuse, it might be reasonably apprehended that it would reach and injure a passenger. While, therefore, the mere burning out of a fuse properly located and in proper condition does not of itself import negligence on the part of the defendant, still, if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers. It would be something like arranging the safety-valve of a locomotive engine so that the escaping steam might reach a passenger in his seat. Upon the whole, we think that the plaintiff had a right to go to the jury on the question of the negligence of the defendant.

It is very strongly urged by the defendant that in a case like this the doctrine of *res ipsa loquitur* does not apply, and in its sixteenth request it asked for an instruction to that effect. The court instructed the jury that the mere fact that the accident occurred is not in and of itself, as matter of law, *prima facie* evidence of negligence, and continued as follows: "That is, you cannot assume, just because an explosion may have occurred, in connection with the testimony in this case and the procedure in this case, that that is of itself negligence as matter of law. I cannot instruct you, as matter of law, that you are to find that *prima facie* evidence of negligence. But it is some evidence of negligence. It is for you to consider that as evidence tending to show negligence, but it is a question of fact for you to decide how far that shows negligence." There was no error in refusing to give the ruling requested. There was evidence, as above stated, which would warrant the conclusion that the intensity and duration of the flame produced by this explosion

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was greatly in excess of what could have been the result if the fuse had been in proper condition, and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. Such being the case, the defendant was not entitled to the ruling requested. And the jury were properly instructed that the matter was before them to decide how far negligence could be inferred from the accident itself. If the defendant desired to call the attention of the court to the precise phase of the testimony where the principle would not apply, it should have done so more distinctly.

The defendant also contends that, even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in *Winship v. New York, New Haven & Hartford R. Co.*, 170 Mass. 464, and *Buckland v. New York, New Haven & H. R. Co.*, 181 Mass. 3, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it.

The defendant strenuously contends that there was no evidence of physical injury, either by the flame or by electricity, and that the sufferings of the plaintiff were due simply to fright. It would not be profitable to recite further in detail the evidence bearing upon this question. The charge to the jury was sufficiently full and clear upon this point, and, while a decision for the defendant might reasonably have been expected, still we cannot say that the

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and that the fact that the defendant was physically injured by the failure of machinery, is immaterial.

It was within the province of the court to allow the question to be put to the jury, concerning the possibility of an electric shock.

No other issues in the matter in which the court dealt with the sequence of the judgment.

Reversed and remanded.

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Black Island: Supreme Court.

1. **ELECTRIC WIRES, ETC., FOR LIGHTING RESIDENCE CONSTITUTE FIXTURES:**
MERCHANIC'S LIEN.—Electric wires, conduits, switches, etc., in a house to be used for lighting the same, are annexed to the structure, become a part of it, and are thereafter fixtures. A contractor furnishing labor and material for the installation of electric light wires, conduits, etc., in a house is entitled to a lien therefor under chapter 206 of General Laws 1896.

Petition by plaintiff against defendant for mechanics' lien.
 Decided July 8, 1903; reported 55 Atl. 754.

C. M. Lee, for petitioner.

Barney & Lee and Van Slyck & Mumford, for respondent.

PER CURIAM:

The question raised by this case is whether a contractor who furnishes labor and materials in installing electric wires, conduits, switches, etc., in a house, to be used for lighting the same, is entitled to a lien therefor under chapter 206 of the General Laws of 1896. We have no hesitation in answering the question in the affirmative. The materials in question are annexed to the struc-

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ture, become a part of it, and are intended to remain there until they wear out. The raw materials of which the lighting installation is composed lose their character as yards of wire and individual articles of commerce, and become members of an organized system, with parts and proportions adapted to their place and service in the building, and by being adapted to this special use they lose their value for any other. It has been so held in *Mulholland v. T. H. Elec. Co.*, 66 Miss. 339, 6 South. 211. Under the statutes in Kansas, Missouri, New Jersey and Oregon a system of electric poles and wires extending from a central station through the streets has been held subject to a mechanics' lien as fixtures or appurtenances of the station. *Southern Electric Supply Co. v. Rollo Elec. Light & Power Co.*, 75 Mo. App. 622; *Badger Lumber Co. v. Marion Water Supply*, 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; *Hughes v. Lambertville Elec. Light, Heat & Power Co.*, 5 Am. Electl. Cas. 626, 53 N. J. Eq. 435, 32 Atl. 69; *Forbes v. Willamette Falls Elec. Co.*, 3 Am. Electl. Cas. 527, 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793. We might hesitate to adopt these decisions under our statute, but the interior installation, with which we are concerned, is a fixture, and part of the freehold, in the strictest sense.

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Missouri; St. Louis Court of Appeals.

1. **TITLE TO CONDUITS, WIRES AND MANHOLES.**—Where a municipality has delegated to an electric company the right to use its streets for the construction and use of conduits and manholes, constructed from the surface of the street to the conduit beneath, the title to such manholes is in the electric company. Such conduits, the wires therein, and the manholes constructed for the purpose of reaching such conduits and wires, remain the property of the company putting them in, subject to the easement of the public in the use of the street as a thoroughfare.

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2. **LIABILITY FOR INJURY TO MANHOLE.**—If the municipality lawfully permits private property to be placed and kept in a street or highway, and this property is damaged by the carelessness of another, the owner of such property may recover compensation for the injury so done. If, therefore, a manhole was put down in the street by an electric company a right of action exists in favor of the company, if such manhole is tortiously broken.
3. **LIABILITY FOR INJURY TO MANHOLES.**—Manholes should be so constructed as to bear any load which experience shows is likely to pass over them in the ordinary transactions of the community, but not necessarily any load which may be hauled, or that other parts of the street will bear, for it is impossible to thus construct them. A person desiring to convey a load of extraordinary and dangerous weight along the streets should take care to avoid the weak parts of the streets, or to use such parts with precautions to prevent injury. In the case at bar it appeared that there was ample room to pass along the street without passing over the covers of the manholes. No precautions whatever were taken to prevent the load, which was of excessive weight, from injuring these covers. Prior to the injury of the one for which suit is brought, seven or eight had been previously crushed by the same load. It was held that in view of these facts the plaintiff made out a *prima facie* case.

Appeal by plaintiff from judgment for defendants. Decided November 3; 1903; reported 102 Mo. App. 95, 76 S. W. 736.

Gilliam & Smith, for appellants.

Morton Jourdan, for respondents.

Opinion by GOODE, J.:

This appeal is from an order refusing to set aside an involuntary nonsuit in an action for damages for injuries caused to a manhole by negligently and recklessly driving a wagon containing a great and uncommon load across it. The plaintiffs are all electric lighting companies, organized under the laws of the State of Missouri, and joint owners of the manhole. Said corporations had constructed conduits under the surface of the streets, in which their wires were stretched, and manholes that afforded access to the conduits for the purpose of making repairs. The ordinances of the city require wires and cables used in transmitting electricity to be placed underground, and authorized the board of public im-

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provements of the city to grant permission to companies wishing to use wires for the transmission of electricity to construct conduits, ducts, manholes, and other appurtenances in the streets on such terms as, in the opinion of said board, will best subserve the public welfare. All those structures are required to be made in accordance with specifications prescribed in the city ordinances; and to secure compliance, as well as to save the city harmless from damages which may arise from such uses of the streets, the city must be indemnified by a large bond, and also given the right to supervise the construction of the conduits and manholes, and, from time to time, to order changes in their material or their location in the streets; all to be made at the expense of the owners. *Mun. Code*, article 6.

Plaintiffs had obtained permission to build their conduits and necessary manholes under the streets of St. Louis, among others under Fourth street. The particular manhole with which we are concerned is on the west side of that street, 5 feet and 2 inches east of its west curb, 10 feet and 5 inches west of the west rails of the street railway thereon, 44 feet west of the east curb, and 49 feet south of St. Charles street. It was 6 1-2 feet deep, 5 feet square, consisting of four brick walls, with an iron roof over them, and a cast-iron plate 30 inches square and 1 1-2 inches thick on top of the roof, under which were iron ribs 1 1-2 inches deep. This plate rested on a socket, and the brick walls supporting it were 13 inches thick. Two 6-inch beams ran from one of those walls to the other, a distance of 5 feet, and on those beams the manhole cover rested. The manhole in all its parts was shown to have been constructed in accordance with the ordinances.

There was evidence to show that it would support, without breaking, a load of 26,000 pounds, though just what weight would break it depended upon whether the load was hauled quietly or with jolts. There was also evidence to prove that the usual load of a two-horse wagon in the city was about 5,000 pounds, of a four-horse wagon about 20,000 pounds, and that occasionally a six-horse load was drawn through the streets, but the weight of such a load was not shown.

The cover of this manhole was broken by the defendants driving a wagon over it which weighed about 13,000 pounds, loaded with a solid granite column weighing 50,000 pounds; the total weight being from 63,000 to 64,000 pounds. The same wagon broke seven or eight other manhole covers on the same trip before it reached this one. No precautions were taken by the defendants to protect them from breaking, and their contentions are that manhole covers in a street ought to be as strong as the rest of the surface of the street, and that if this one broke under a load which could be driven over the street without detriment to the granite blocks with which it was paved plaintiffs must bear the loss. On the other hand, it is contended by the plaintiffs that if they constructed their manhole and its parts in conformity to the specifications of the ordinances, and strong enough to bear the heaviest loads which are accustomed to pass along the street, they complied with their legal duty; and if their property was damaged by a load so extraordinarily heavy that it could not have been anticipated as likely to pass over the manhole, and which was hauled over it without precautions, when the defendants knew it was likely to break the cover, they are entitled to recover their loss. Defendants further insist that plaintiffs were mere licensees in the use of the street, had no property in or ownership of it, and hence cannot recover for any damage done to the manhole, as it composed part of the street.

1. The title of the injured property was clearly in plaintiffs, whose conduit was legally laid under the street, and their manhole legally constructed from the top to the conduit beneath. The municipality of St. Louis has power, legislatively delegated, to grant a person or company the right to use its streets in that manner, as tending to promote the public comfort and convenience, the use being thereby distinguished from a purely private occupation of a highway. This proposition was decided in *State ex rel. Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. A. R. 113—a case in which the city of St. Louis had originally granted to the National Subway Company a right to construct conduits for electric wires under the streets of the city, with the necessary manholes, and

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afterwards had refused to consider specifications for manholes submitted by the subway company on the ground that the original franchise was void. The Supreme Court, in an elaborate opinion, held that it was incumbent on the city to allow the construction of manholes to reach the conduits which had been laid and occupied by electric wires. The opinion, after reviewing certain authorities, says: "It must follow from what has been said that the city of St. Louis, having control, as it does, over its streets, might, for the purpose of meeting the necessities of electric companies set apart for them a part of its streets, on such terms and conditions as it might reasonably impose, without in any way misappropriating the streets or any part of them." And this doctrine is in harmony with the current of decisions. *Julia Building Ass'n v. Telephone Co.*, 1 Am. Electl. Cas. 801, 88 Mo. 258, 57 Am. Rep. 398; *St. Louis v. Telegraph Co.*, 4 Am. Electl. Cas. 115, 149 U. S. 467, 13 Sup. Ct. 990, 37 L. Ed. 810; *Id.* 148 U. S. 102, 4 Am. Electl. Cas. 102, 13 Sup. Ct. 485, 37 L. Ed. 380.

2. Conduits, wires, and manholes placed under and in the streets of a city, pursuant to permission, do not become the city's property, but remain the property of the companies which put them in, subject, of course, to the easement of the public in the use of the street as a thoroughfare, and to the city's regulation and control, which may not be surrendered. It would be as reasonable to say that the rails and wires of an electric railway company, when laid on and over the surface of a street by municipal authority, belong to the municipality, and cease to belong to the railway company. The manhole in all its parts belonged to the plaintiffs. Plaintiffs paid the cost of building it, are obliged to keep it in repair, and are plainly recognized and designated in the ordinances as its owner. One section of the ordinance under which it was built says that all conduits, manholes, and other appurtenances shall be maintained by the owner thereof to the satisfaction of the board of public improvements, and that, failing their proper maintenance by the respective owners, the board may order the necessary work done, and require the owners to pay for it, under penalty of a suit on the bond given to the city. While the wisdom of

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allowing private corporations or individuals to occupy city streets with their property may be a matter of serious public concern, if they are allowed to do so their property in the streets is entitled to the same protection, neither more nor less, that it would enjoy if the city itself owned it; and, indeed, the city does own numerous manholes similarly located.

3. That municipalities have a right of action for injuries to municipal property, such as bridges and highways, is beyond dispute, cases of that kind having been often successfully litigated by cities, counties, and townships. *Bidelman v. State of New York*, 110 N. Y. 232, 18 N. E. 115, 1 L. R. A. 258; *Lawrence County v. Railroad*, 81 Ky. 225; *Pierrepoint v. Lovell*, 4 Hun, 696; *Louisville, etc., Ry. v. Whitley Co.*, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220; *Commonwealth v. Allen*, 148 Pa. 358, 23 Atl. 1115, 16 L. R. A. 148, 33 Am. St. Rep. 830; *Troy v. Railroad*, 23 N. H. 83, 55 Am. Dec. 177; *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105. In the *Bidelman* Case certain bridges and culverts of the town of Gaines were damaged by a break in the Erie Canal, caused by the negligence of the agents and officers of the State, and it was held that, as the town was liable for the maintenance and repairs of its highways, it had an interest in the preservation of its bridges and culverts, which gave it a right of action and remedy over against any person who intentionally made repairs or rebuilding necessary. In *Troy v. Railroad Co.*, 23 N. H. 83, the action was for demolishing and destroying a bridge on a highway which belonged to the town. It was held that, as the town had to maintain its roads and bridges, it had such an interest or property in them that any person, even the owner of the ground to which the highway pertained as an easement, who destroyed or injured the highway, was liable to the town for the consequent damages. *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105, is to the same effect. A standard author thus states the rule: "Where the duty of constructing and maintaining highways is enjoined upon road districts or townships, then, as we suppose, they must prosecute the action necessary to prevent an

injury or destruction of the easement vested in the public; but where the statute makes no provision upon the subject, and counties have a general charge of county affairs and property, the action may be prosecuted by the county within whose territory the road is situated." *Elliott, Roads & Streets* (2d Ed.), section 442. We know no rule which denies a municipality the same right to sue for damages to its property, an individual has, or as much right to sue for damages to highway property due to a tort as for damages to any other property. Undoubtedly a city has the right, as the above authorities show, to recover compensation for injury done to its highways by carelessness or wantonness; and on the same principle, if it lawfully permits private property to be placed and kept on a highway, and this property is damaged while there by carelessness, the owner has like redress. We therefore find no difficulty in holding that, as plaintiffs' manhole was put down by authority, an action arose in their favor if it was tortiously broken.

4. The next inquiry is, did the defendants commit a tort? And this question goes to the respective duties incumbent on the parties—the duties of the plaintiffs in constructing the manhole with respect to its weight-bearing strength, and of the defendants in hauling an exceptional load over it after being warned of the danger of breaking the cover by their experience with other manhole covers. The plaintiffs' manhole was constructed according to municipal regulations, and, like others in the city of St. Louis, is not disputed. But this fact alone is not conclusive as to its merit. The true test of the sufficiency of the cover was its fitness to bear the strains that would naturally fall on it according to the course of transportation, and whether it measured up to that standard was a question of fact to be found, for the evidence is susceptible of different inferences. Defendants' position that the law required the cover to be, in any event, as solid as the granite street, we regard, from several points of view, as untenable. To so hold would impose on the plaintiffs a heavier obligation in constructing its manholes than rests on the city itself in constructing manholes and streets. The street in the vicinity of this manhole was paved with

the hardest and strongest substance with which streets are ever paved; but some weaker pavement might bear any load to be reasonably anticipated. And paving it in that manner was from choice, in the exercise of a municipal discretion as to street paving. The pavement might have been wood, brick, or asphalt, which many streets have. All roads and streets need not be of equal solidity, nor need one be of the same construction throughout its course—cannot be, in fact; for in some parts a natural rock foundation capable of resisting any weight may underlie the top, while soil or sand underlies other parts, and bridges and culverts, necessarily of less strength than rock or firm earth, are required in places. The law is that a highway, whether country road or city street, should be of a strength proportioned to the use that will be made of it, and strong enough for the safe passage of not only average loads, but such heavy loads as are likely to pass over it in the ordinary course of travel and transportation, considering its locality. *Gregory v. Inhabitants of Adams*, 14 Gray, 242; *Fulton Ironworks v. Kimball Tp.*, 52 Mich. 146, 17 N. W. 733; *Wilson v. Town of Granby*, 47 Conn. 59, 56 Am. Rep. 51; *Sindlinger v. Kansas City*, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723. But this is far from saying that the highway must be everywhere strong enough to support any load a person may have occasion to haul. All decisions dealing with the subject tend to the conclusion that a thoroughfare may be taxed by a weight great and exceptional, which it cannot be expected to bear, need not have been prepared to bear, and to which it ought not to be subjected. The proposition has been discussed mostly in actions for injuries to persons and property caused by the collapse of a bridge, where the defense was an excessive strain put on the bridge; but those cases bring into clear view the principle involved, which is that the law requires highways to be constructed for safe uses in customary modes, such as are required for the reasonable convenience of the community's ordinary affairs, and not for extraordinary uses, either in the weights transported or strains otherwise imposed. *Yordy v. Marshall County*, 80 Iowa, 405, 45 N. W. 1042; *Clapp v. Town* (Sup.), 3 N. Y. Supp. 516;

McCormick v. Washington Tp., 112 Pa. 185, 4 Atl. 164; *Coulter v. Pine Tp.*, 164 Pa. 543, 30 Atl. 490; *Larue v. Railroad*, 170 Pa. 249, 32 Atl. 977; *Commissioners v. Chipps*, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228. The further rule is also deducible from the decisions, that a person using a road or street is bound to use it in a reasonably careful manner, and that he violates this duty if he subjects it to extraordinary strains and burdens without corresponding care to prevent harm.

Cases in which the public sought compensation for injuries to highways by tortious use are infrequent; but, on principle, the right to compensation is obvious. A man may start over a granite roadbed with an inordinate load, which will, however, make no impression on the granite blocks. He may come to a bridge or other structure that the load will crush. Shall he then proceed, regardless of ruin to the structure, if he can prevent injury by a slight detour or other easy preventive measure? Surely the law does not permit such conduct. Occasionally the maximum load is fixed by statute. When it is not, the jury must determine what it ought to be by their knowledge, gathered from experience and observation.

Precedents are not altogether wanting. An ancient one exists wherein a prosecution for hauling an excessive load on the high-road from Oxford to London was successfully maintained in the Court of King's Bench, and wherein it was said, too, that any citizen specially damaged by the wrong might maintain his private action. *Rex v. Edgerly*, 3 Salk. 183; J. March's Rep. 135. In *Commonwealth v. Allen*, 148 Pa. 358, 23 Atl. 1115, 16 L. R. A. 148, 33 Am. St. Rep. 830, the case was an indictment for maintaining a nuisance. The nuisance charged was that defendants ran over a public road an engine propelled by steam, commonly known as a traction engine, which obstructed and injured the road, and a conviction was sustained. The court said, regarding the offense, that highways and bridges are constructed for ordinary use in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight.

5. The proposition that a private owner of property lawfully in the highway, such as a street railway, or under it, such as gas pipes, has a remedy for careless or willful injury to it, has received judicial attention and approval. An act of that sort directly infringes the precept that one ought to use his own possessions so as to do no needless harm to others—a precept of obvious justice, and so widely applicable to practical affairs that most of the rules of tort law, designed to regulate conduct in different situations and circumstances, have been developed from it. And the maxim itself is, in the absence of satisfactory precedents, a trustworthy criterion of the lawfulness of an act. In *Normantown Gas Co. v. Pope*, 49 L. T. N. S. 798, the gas company had been given permission to lay pipes and mains under the surface of the road. Defendants were incorporated for working beds of coal in Normantown and other places. They had mined under a highway, in consequence of which the road subsided over a considerable portion of its length, causing the mains and gas pipes to be broken in several places, for which damages were prayed, and an injunction against the continuance of the wrongful acts. It was held that, as the gas company was given the right by the Legislature to lay its pipes and mains, it acquired also the support of the adjacent land as against the landowner. Damages were awarded. In *Railroad Co. v. Morris*, 8 Phila. 304, a street railway company was notified that the defendants proposed to occupy the streets on which the railway was for a couple of hours in hauling some heavy boilers. The railway company filed a bill to restrain the moving of the boilers, alleging that it would stop their cars, and also greatly inconvenience the public, and that the passage of the boilers would injure the highway, and cause damage to the railway company, since it was required to keep the highway in repair; also would damage the sewer under the street. The injunction was refused, because the court thought the stoppage of travel would be very brief, and that the boilers could be moved without damage to the street; but the proposition was recognized that, if moving the boilers would result in damage to the street, relief might be granted. In *Gaslight & Coke Co. v. Vestry of St. Mary Abbots*,

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Kensington, 15 Q. B. Div. 5, plaintiffs had laid some pipes under the surface of certain streets, as their franchise entitled them to do. The title to the street was in the vestry, which was charged with keeping it in repair. Heavy steam rollers were employed to make repairs, thereby injuring the plaintiff's pipes, which were sufficiently below the surface of the street not to be injured by ordinary modes of repair. On these facts an action for damages and an injunction was brought by the plaintiff. Defendants succeeded below, and an appeal was taken. The court held plaintiff was entitled to relief, both for the damages and against similar injuries in the future. The respective rights of the parties were dealt with, as follows: "It is obvious from the foregoing statement that the rights of the plaintiff and of the defendants are to a certain extent conflicting. On the one hand, it is plain that the plaintiff's right to lay its pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair; on the other hand, it is equally plain that the duty of the defendants to the public and their right against the plaintiff is to repair the streets and keep them fit for traffic. Now, there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiff's pipes; but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements, regardless of the effect on the plaintiff's pipes. FIELD, J., has held that this contention cannot be supported, and we are of opinion that his decision is correct. . . . In this case there is no statute, and it is not necessary to say more. But the conclusion thus arrived at on general principles only is, in our opinion, very much strengthened by those statutory enactments, which empower the defendants to require the position of the plaintiff's pipes to be altered for the public benefit, but which also compel the defendants to pay the expenses of such alterations. We refer particularly to 10 & 11 Vict. c. 34," etc.

6. The result of all the adjudications which directly or remotely bear on this case, so far as we have found, is that persons are not privileged to haul loads that are extraordinarily heavy over roads

or streets without regard to the detriment to the street itself or structures lawfully constructed in it, but can only make such use of the street as is reasonable, all the circumstances considered, and considering especially the loads that should have been anticipated, in view of the travel and transportation in the particular locality. The conclusion is to be deduced, too, that not any load or pressure which the street as a whole will bear may always be lawfully transported over it, but that some reference must be had to property in and under it, such as gas pipes, conduits, culverts, and the like. The rule is wise, for the needs of modern life are thought to make it necessary and beneficial to use city streets for other purposes than travel and transportation. The comfort and convenience of the community demand sewerage, gas, electricity, water, and rapid transit, which necessities can be, as is supposed, best distributed by allowing suitable appliances to be put on, over, and under the streets. There must, of course, be access to the underground pipes and conduits for repairs. Such access is afforded by manholes, which are as necessary, perhaps, as the pipes themselves, and must be considered and regarded in the use of the streets. They should be constructed so as to bear any load which experience shows is likely to pass over them in the ordinary transactions of the community, but not necessarily to any load which may be hauled or that other parts of the street will bear, for it is impossible to thus construct them. Tunnels are made in streets for cables to run in, and those tunnels are of less supporting strength than the solid surface of the street. There is testimony in this record that cable conduits are sometimes injured by excessive loads passing over them, and that the granite paving above them is thereby depressed. Where these necessary constructions exist, a person who desires to convey a load of extraordinary and dangerous weight above them ought to take care either to avoid the weak parts of the street or to use those parts with precautions to prevent injury.

The testimony before us tends to prove a disregard of plaintiffs' interest and rights which was culpable; for if the defendants were not apprised of the danger of breaking manhole covers by the first one or two they broke they certainly were apprised before they

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broke this one, as they had previously crushed seven or eight. In fact, on their contention, they might crush every manhole, private or municipal, in the city with impunity. It appears there was ample room to pass by instead of over the covers, and there was evidence tending to prove that when loads of excessive weight are drawn along the street the surface of it can be protected by laying boards or metal plates for the wheels of the wagon to roll over.

We do not decide that this manhole was properly made; for there was some testimony that the weight under which it broke was less than it should have been. Neither do we determine that as a matter of law the weight which the defendants hauled over it was so exceptionally great as to be excessive, or that the defendants were guilty of negligence in any way. Our decision is that there was evidence bearing on those questions, to be weighed; in other words, that plaintiffs made a *prima facie* case. We think, therefore, the Circuit Court erred in sustaining a demurrer to the evidence and in refusing to set aside the involuntary nonsuit.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

BASTIN TELEPHONE CO. v. RICHMOND TELEPHONE CO.

Kentucky; Court of Appeals.

1. CONTRACT BETWEEN TELEPHONE COMPANIES FOR CONSTRUCTION OF TELEPHONE LINE.—A parole contract, entered into between two telephone companies, was to the effect that one of them should build a telephone line from a certain town and the other from another town to a point half way between the two towns, and there connect, and that each should have the use and benefit of the other's line and connection free of charge for a period of twenty years. The poles were to be erected by both parties, and connection was to be made within a year from the date of the contract. It was held that such contract was void, since it was not in writing, and could not be performed within one year from the making thereof. The portion of the agreement relating to the terms upon which each was to use the other's lines, and the length of time for which such use was to exist, constituted as large a part of, and as important an element in, the contract as the provision for the construction of the lines.

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Appeal by plaintiff from judgment sustaining defendant's demurrer. Decided December 16, 1903; reported 77 S. W. 702.

J. Tevis Cobb, J. E. Robinson, and Lewis L. Walker, for appellant.

Smith & Bush, for appellees.

Opinion by NUNN, J.:

Appellant sued appellees, the Richmond and Cumberland Telephone Companies, for \$2,000 damages, for the violation of a parol contract to the effect that each party should build a telephone line, one from Richmond, Ky., the other from Lancaster, Ky., to a point halfway between the two towns, and there connect, and that each should then have the use and benefit of the other's lines and connection free of charge for a period of 20 years. The poles were to be erected by both parties, and connection made, within a year from the date of the contract. They were actually erected by appellant within the time stipulated in the contract, and appellee Richmond Telephone Company had partly erected its part of the line, when, as alleged, the appellee Cumberland Telephone Company obtained a majority of the stock in the Richmond Company, and took the control and complete management thereof, stopped the erection of this line, and refused to carry out the contract, and had abandoned the same. The lower court sustained a demurrer to the petition, evidently on the ground that an action on such a contract was inhibited by the statute.

The appellant contends that because the contract stipulated that the poles were to be erected on the line between the two towns, and the connection made, within the 12 months, and that it was within the power of the parties to the contract to complete same within the time named, therefore the contract was valid and binding. So much of section 470, Ky. St., as is applicable to the question presented, reads as follows:

"No action shall be brought to charge any person . . . upon any agreement which is not to be performed within one year from the making thereof,

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unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith. . . ."

The statute refers to such contracts as cannot be performed by either party within a year, and although it may contain various stipulations, some of which may be performed within a year, yet if any part of it cannot be so performed it is clearly within the statute.

In the case of *Halloway v. Hampton*, 4 B. Mon. 415, the plaintiff had agreed to sell and deliver to defendant his crop of hemp then on hand, as soon as prepared for manufacture, to be delivered at a certain place and at a certain price, and in like manner to deliver his crop of the two succeeding years. The suit was brought for the refusal of the defendant to receive and pay for, at the contract price, the next succeeding crop after the date of the contract. Defendant contended that the contract was not to be performed within a year, and, being verbal, was within the statute. The court, in discussing that case, said:

"The question has presented itself whether, as the crop of the first year succeeding the date of the agreement might have been delivered within a year from that time, this action might not be maintained upon the stipulations relating to that crop; but upon consideration of the subject we are satisfied that the agreement, though it consists of various mutual stipulations which may be performed or violated at different periods, must, in view of the statute, be regarded as one entire contract, as indeed it is in fact, and that, although some of its stipulations might be performed within the year, yet as the agreement—that is, the entire agreement, for there is but one—is obviously not to be performed within the year, and cannot be, no action can be maintained for the breach of those stipulations which might and should have been performed within that time. The statute embraces all agreements which are to be fully performed within the year."

The agreement in that case to deliver the second and third crops of hemp was as much a part of the contract as the stipulation to deliver the first. So, here, the agreement for the use of the two telephone lines, the terms upon which each was to use the other's lines, and the length of time for which such use was to exist, constitute just as much a part and as important an element in the contract as the provision for the construction of the lines. The

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completion of the lines and connection of the wires would not and could not complete this contract. It would be but the beginning of the expected beneficial part of the same. An executed contract is defined as "one in which the object of the contract is performed." The violation of this verbal contract by appellees, and the statutory prohibition in the way of the enforcement of it, will work injury to appellant, but it results from the neglect of appellant in not having this contract, or some memorandum thereof, reduced to writing and signed by the parties.

For these reasons, the judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. PENNSYLVANIA CO.

United States Circuit Court, Western Division, Pennsylvania.

1. CONTRACT BETWEEN RAILROAD COMPANY AND TELEGRAPH COMPANY.—A contract entered into by a railway company and a telegraph company, executory in its character, for the purpose of establishing a relationship between the parties covering telegraph appliances and facilities thereafter to be constructed, providing for their repair and extension, and regulating their use in the transmission of railroad business for the benefit of the railroad, and of commercial business for the benefit of the telegraph company, containing no words conveying to the telegraph company any title to the real property, does not operate as a grant of any interest in real property to the telegraph company. The contract creates a joint enterprise and ownership and is terminable at the option of either party on reasonable notice.

Demurrer to bill in equity. Decided October 6, 1903; reported in 125 Fed. 67.

Rush Taggart and A. M. Neeper, for complainant.

Dalzell, Scott & Gordon, for defendant.

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Opinion by BUFFINGTON, District Judge:

This is a demurrer to a bill in equity filed by the Western Union Telegraph Company against the Pennsylvania Company, lessee of the Cleveland & Pittsburg Railroad Company. The bill is based upon an agreement entered into in October, 1856, between the Western Union Telegraph Company and the Cleveland & Pittsburg Railroad Company; and the rights of the complainant herein considered arise under that contract, and an alleged subsequent parol modification thereof. On June 2, 1902, the Pennsylvania Company, the successor of the Cleveland & Pittsburg Railroad Company, notified the telegraph company it would terminate such contract in one year thereafter, whereupon the latter filed this bill to compel specific performance, and to enjoin respondent from terminating the contract. The respondent has demurred, and the questions involved in such demurrer which are herein considered are, first, whether this agreement conveyed to complainant an easement or grant of real estate in perpetuity; and, secondly, whether the contract is terminable by the railroad on reasonable notice. In view of the case of *The Western Union Telegraph Company v. The Pennsylvania Railroad Company* (C. C.), 120 Fed. 362, and the affirmance thereof by the United States Circuit Court of Appeals (123 Fed. 33), it is not necessary to here consider any right claimed by the bill to vest in the complainant by virtue of the act of Congress of July 24, 1866 (14 Stat. 221, ch. 230). The case turns on the agreement of 1856, and the meaning and construction of such contract are referable to its date of execution. If the writing then vested no interest in realty, the actions of the parties since have not enlarged its scope, for both have acted and are now acting under it, and their existing rights and status are derived therefrom. The property here involved is situate in Ohio and Pennsylvania, and in these States a grant of realty, by their statutes of fraud, must be in writing. The common-law requirement in a conveyance of real estate is that it shall contain apt words of conveyance, or manifest a clear intent by other terms. Examination shows that this writing contains no apt words of conveyance, nor evidences an intent to con-

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vey. Its form is not that of a conveyance. It styles itself not by the title given to a conveyance, viz., "lease," "indenture," or "deed," but by that of "agreement" or "contract;" and, while it is a mere formal matter, it will be noted the grantor of the alleged realty is made the party of the second part, and the grantee, of the first part. Moreover, if this paper is to be regarded as a conveyance, and its effect is to create a perpetual servitude and easement on the property of the railroad, and to bind the telegraph company, in perpetuity, to operating and exercising such easement, then these broad powers and obligations are irrevocably granted and assumed in perpetuity by these respective corporations, without recital of any statutory authority thereto enabling them, or, if such powers are presumed, no corporate action authorizing their exercise by the executive officers is recited. The paper simply shows exercise of power by the executive officers, without reciting enabling statutory authority or corporate action. Presumably, this agreement was made between parties familiar with the forms and requirements of conveyance and due corporate action. It was between companies engaged in large affairs. They knew what each meant to grant and acquire. The omission, then, from this contract of all form, words, and terms incident to a conveyance of realty, and of reference to authority to exercise the broad powers now imputed to this writing, is most significant. If the parties intended to convey and grant, presumably they knew how to express such interest in fitting terms. But if the instrument was capable of such construction as to make it a conveyance, it must be conceded it would be a strained one, and therefore one to be resorted to only in case it is not susceptible of a single, natural construction. But this we think it is. The paper was executory. No present consideration passed. The purpose was to establish a relationship between the parties covering telegraph appliances and facilities thereafter to be constructed, to provide for their repair and extension, and to regulate their use in the transmission of railroad business for the benefit of the railroad, and of commercial business for the benefit of the telegraph company. Such agreements have been held to create joint enterprises

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and ownerships. *St. Paul, etc., Co. v. Western Union Telegraph Company*, 118 Fed. 511, 55 C. C. A. 263; *Western Union Telegraph Company v. Burlington, etc., R. Co.* (C. C.), 1 Am. Electl. Cas. 402, 11 Fed. 1; *Atlantic & Pacific Tel. Co. v. Union Pacific Railroad Co.* (C. C.), 1 McCrary, 541, 1 Fed. 745. By it the railroad was to secure telegraphic services in conducting its business, and the telegraph company was to have the use of railroad property, and the facilities to carry on a general commercial telegraphic business. In the original installation the railroad was to furnish in place poles and cross-arms; the telegraph company to furnish wire, insulators, instruments, and patents, and string one wire. For stringing this wire the railroad was to pay \$30 per mile. Certainly, by this original installation of poles, cross-arms, and wires thus made or paid for by the railroad company, and located on its own ground, it cannot be said that the telegraph company acquired any title to the land to which these fixtures were attached. For aught that appears in the contract, the telegraph company had no express right of entry to these poles or wires. The duty of keeping the line in order rested upon the railroad, and under the parol modification the telegraph company simply furnished material, while the railroad did the work. Under a working contract for such a joint undertaking, it is clear that no easement or grant of any interest in realty was contemplated or required. It is true, the telegraph company had the right to string another wire for its own use; but this, it will be observed, was on the poles of the railroad, and such right, when exercised, was not incident to ownership created or vested, but because the contract expressly allowed it. Indeed, the express grant of such right by section 5 implies that, in the scrivener's view, such grant was essential to the exercise of that which would have been an incident of ownership, if the telegraph company, by the agreement as a whole, was vested with a line easement. The eighth clause provides that the railroad company was not to allow any other telegraph line or individual to build or operate a line of telegraph on or along the said railroad, or any part thereof. Such a provision was held, in the case of *The Pacific Company v. Western Union*

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Telegraph Company (C. C.), 4 Am. Electl. Cas. 232, 50 Fed. 494, incompatible with the contention that the contract conveyed a right to the real estate, because it amounts to an assertion by the railroad company of a right to control the future use of the ground. That the material furnished by the telegraph company went into the construction of lines does not of itself make them or it realty. Much less does it draw to such personalty ownership of the particular ground on which they are placed. It must be borne in mind that they are so placed under the contract, and if the contention of the parties, evidenced by that contract, was that they were not to be considered realty, they will be treated as personalty. Whether fixtures such as poles, wires, and rails lose their character as personalty depends in a great measure upon whether the one who placed them on another's ground intended such a result. *St. Paul, etc., Co. v. Western Union Telegraph Company*, 118 Fed. 513, 55 C. C. A. 263; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 409, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374; *Wagner v. Cleveland, etc., R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770; *Northern Central R. Co. v. Canton Co.*, 30 Md. 347; *Toledo R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Oregon Co. v. Mosier*, 14 Ore. 522, 13 Pac. 300, 58 Am. Rep. 321; *Western Union Co. v. Burlington* (C. C.), 1 Am. Electl. Cas. 402, 11 Fed. 1; *Tift v. Horton*, 53 N. Y. 380, 13 Am. Rep. 537. To these may be added *Apsden v. Austin*, 5 A. & Ellis (N. S.), 671, where the court said:

"It is possible that each party to the present instrument may have contracted on the supposition that the business would be carried on, and the service in fact continued, during the three years, and yet, neither party might have been willing to bind himself to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they either purposely or unintentionally have omitted. The former is but the application of a rule of construction to that which is written. The latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

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The agreement then being one for the furtherance of a joint enterprise, and not for the grant of an interest or easement in realty, we are of opinion it was terminable at the option of either party on reasonable notice. No time was specified for its continuance, but clearly, under the terms of this contract, its subject-matter, and the objects in view, the failure to specify any time could not imply that this agreement was for all time. As is the case in many joint enterprises without time limit, the parties probably assumed the success of the enterprise and benefits accruing therefrom to the parties afforded a guaranty of indefinite continuance. The outcome justified such belief, for this contract, without provision for continuance, has, through the advantages accruing to both parties, worked its own extension for nearly 50 years. The view that the contract, being without limit, was terminable, is in accord with the authorities. *Echols v. New Orleans R. Co.*, 52 Miss. 610, was a contract for cord wood to be furnished without limit of time, save that it was to "continue as long as satisfaction be given by the contractors." It was held terminable on reasonable notice, although there was no default of the contractors, the court saying:

"Perpetual contracts of this character will not be tolerated by the law, or, rather, will not be enforced as imposing an eternal and never-ending burden. An agreement to furnish a support or service or a particular commodity at a specified price, or to do a certain thing without specification as to time, will be construed either as terminable at pleasure, or as implying that the thing to be done shall be implied within a reasonable time, and the obligations shall cease with the same limitation. Any other theory than this would subject incautious persons—a class, it may be remarked, which includes the majority of mankind—into lifelong servitudes, and greatly fetter and embarrass the commerce of the world. Indeed, it may be said that any other theory is a moral and practical impossibility, and, if indulged in by the courts, could not be enforced in the ordinary concerns of life."

In *Jones v. Newport News Co.*, 65 Fed. 736, 13 C. C. A. 95, a coal tipple and trestle were constructed by a warehouseman under an agreement with the railroad that it would construct a switch thereon and deliver coal to him. There was no agreement as to time. It was held the railroad company could terminate the switch right, the court saying:

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"It is not alleged that either the defendant or his predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to time, the implication is that the switch was to be maintained at all times; i. e., forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in *Texas & P. Railroad Co. v. City of Marshall*, 136 U. S. 393 (10 Sup. Ct. 846, 34 L. Ed. 385)."

In the case of *The B. & O. R. R. Co. v. The Ohio Company*, referred to in the case of *The Chattanooga Co. v. Cincinnati Co.* (C. C.), 44 Fed. 456, it was held that though there was a grant by the Ohio & Miss. Ry. Co. that the B. & O. R. R. Co. "shall have the exclusive right to forward express matter over the said railroad of the party of the second part," and the latter company had established and opened offices all along the line of the railroad of the Ohio & Mississippi Company, and had acted under a contract for some years, it was nevertheless terminable by the Ohio & Mississippi Company. *Coffin v. Landis*, 46 Pa. 432, was an agreement without specification of time continuance. This the court refused to regard as perpetual, saying:

"It is evident, then, that were we so to construe the agreement as to hold obligatory upon the one party to employ, and upon the other party to serve, during any period, we should be in danger of imposing liabilities which both parties purposely avoided assuming. And if it be admitted that neither of the parties contemplated a severance of the relation formed by the contract, at the will of the other party, it does not follow that we are at liberty to treat the agreement as containing a covenant against it. That would be to make an expectation of results equivalent to a binding engagement that they should follow."

Without discussing at length cases cited by counsel for the telegraph company, of which the *Mississippi Logging Co. v. Robson*, 69 Fed. 775, 16 C. C. A. 400; *Great Northern Ry. Co. v. Manchester, S. & L. Ry. Co.*, 5 De Gex & S. Ch. Rep. 138, and *Llanelly Ry. Co. v. London & Northwestern Ry. Co.*, 7 H. L. 550, are examples, it will be observed that present and valuable considerations in each case, on the execution of the several agreements, passed to the party that afterwards sought to terminate. Moreover, in

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considering the English cases, regard must be had to the statutory right of the railroad, by appropriate proceedings, to compel a running arrangement of the general nature provided by the agreement. Holding the agreement nonterminable was therefore, in effect, but giving the railroad what it could secure by statutory proceedings.

After full consideration, we are of opinion the present agreement conveyed no interest or easement in realty, and that it was terminable on reasonable notice, for which latter conclusion we find support in *Texas, etc., Ry. Co. v. City of Marshall*, 136 U. S. 407, 10 Sup. Ct. 846, 34 L. Ed. 385. We are also of opinion the relation between the parties was one of joint ownership and interest in the personalty subject to this particular agreement, but the extent of that ownership or interest is not here involved or determined.

Our view of both the two questions noted in the early part of this opinion being with the respondent, a decree sustaining the demurrer to that extent may be drawn.

Contracts between railroad and telegraph companies; grant of easement in right of way; effect of merger of telegraph companies.—In the case of *St. Paul, Minneapolis & Manitoba Ry. Co. v. Western Union Tel. Co.*, 118 Fed. 497 (Circuit Court of Appeals, 8th Circuit), the following facts appear: A railroad company entered into a contract with certain persons by which the latter agreed to construct, maintain and operate a telegraph line along the right of way of the railroad company upon certain terms and conditions relating to the cost of construction and maintenance, its renewal, and its operation for the benefit of both parties. The contract contained no limitation as to time, and provided that as the railroad was extended along its right of way, the other parties should continue the line of telegraph along the line of railroad upon the same terms and conditions. It contained a further provision that the railroad company, "does hereby grant to the said parties of the first part, for the uses and purposes of this contract and to keep off competing lines, the exclusive right of way for the lines of telegraph along and upon the lands of the party of the second part, as far as can be legally done; and it is hereby mutually agreed that this contract shall be binding upon the successors, representatives, and assigns of both parties hereto." It was held that such contract was not a present grant of an estate or interest in the railroad right of way to be held and enjoyed by the grantees for all time, independ-

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ently of the provisions of the agreement, but that the grant was only intended to continue so long as the contract should continue in force, and that it was within the power of the parties or their successors to terminate the same by subsequent parol agreements. Such contract could in no event be construed as granting a right in the nature of an easement in any right of way which had not at the time been acquired or located by the railroad company. Such contract may be superseded by a new contract between the railroad company and a telegraph company succeeding to the interest of the persons named in the original contract.

It further appeared that the company succeeding to the rights of such persons subsequently transferred all their rights and interests under the contract to the Western Union Telegraph Company. Negotiations were then entered into between the railroad company and the Western Union Telegraph Company whereby such parties agreed jointly to construct telegraph lines along the railroad right of way, for the construction of which they both contributed. It was held that under such contract the parties were equal joint owners of the lines constructed; and that on the termination of the contract the telegraph lines did not become the property of the railroad company because attached to its right of way, nor, on the other hand, did the telegraph company have a perpetual easement in such right of way entitling it to maintain its lines thereon without compensation.

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Until the borough council passes an ordinance regulating the use of the borough streets, or prescribing the manner in which electric light companies shall exercise their street privileges, an electric light company which has obtained the consent of the owners of the soil may string its wires in the public streets of the borough.		Idem.
<i>Officers of borough restrained from interference</i> .—The borough and its officers, who claim the right to cut such wires because strung in the borough streets without the previous action of the borough council, will be restrained by preliminary injunction from such cutting. The injury to the complainant company is continuous, and threatened to be repeated, and is not one for which adequate damages can be recovered at law.		
		Idem.
<i>Use of streets by electric light company where fee is in city</i> .—Where the fee to public streets is in a municipality, it may authorize private corporations or individuals to erect electric light poles on its streets and stretch wires thereon, for the purpose of furnishing light for the use of the municipality and its citizens, provided they do not materially obstruct the use of the streets for public travel.		
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<i>Abutting owners not entitled to compensation</i> .		
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<i>Ejectment by abutting owners</i> .—A person occupying part of a street with poles and appliances for lighting the street, in pursuance of a contract made with the municipal authorities under New Jersey Act May 22, 1894. (P. L. p. 477), has such rightful, exclusive possession of the part so occupied as will support a plea of not guilty in an action of ejectment brought by the owner of the soil. But the right of such a person to use the street in the immediate vicinity of his poles and appliances for the purpose of maintaining them is not capable of supporting such a plea.		
French v. Robb		238
<i>Effect of furnishing light to private persons</i> .—If a person who has rightfully placed poles and wires in a street for the purpose of lighting the street uses them wrongfully for private lighting, he does not thereby lose his right to maintain them as against the owner of the soil.		
		Idem.

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<i>Use by private lighting company is a diversion.</i> —The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner, within the meaning of section 19 of the bill of rights. And such placing of poles, lines, and wires is none the less an unauthorized taking, even though it be consented to by the city authorities.	
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<i>Injunction restraining use.</i> —And where it appears that the acts of the lighting company in so placing its poles, lines, and wires were done without the knowledge or consent of the lot owner, and that their maintenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance, and an order for removal.	Idem.
<i>Rights of abutting owners</i> to compensation for use of streets by electric light companies, see note to	
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<i>Electric light transformers; right of company to charge therefor; unjust discrimination.</i> —It is an unjust discrimination for an electric light company to refuse to furnish to a customer a transformer or converter for the purpose of reducing the current from the main line so as to permit of its safe use for electric lighting purposes in a house, without an extra charge therefor, where it appears that such company has furnished such instruments to other customers without extra pay.	
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<i>Public use.</i> —The erection and maintenance of a dam to obtain water to procure power to generate electricity for the operation of a railroad does not constitute a public use.	
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<i>Railroad right of way.</i> —A telegraph company seeking to acquire for its use a portion of a railroad right of way must show that the easement sought to be appropriated will not in material degree interfere with the practical uses to which the railroad company is authorized to put such right of way.	
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The measure of damages is the amount of decrease in the value of the use of the right of way for railroad purposes which will result from the easement appropriated by the telegraph company. Idem.

Domestic telegraph company organized as an auxiliary of a corporation of another state may acquire railroad right of way by condemnation.

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Power may be exercised under general law (Idaho Rev. Stats. § 5210), provided it does not interfere with the use to which the right of way was originally dedicated, and the use by the telegraph company is a more necessary use. Idem.

Power of telegraph company under Post Roads Act.—Law of Indiana authorizes condemnation by telegraph company of railroad right of way.

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Constitutionality of South Carolina statute authorizing condemnation of railroad right of way by telephone company, see

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Injury to lineman by contact with live wire; knowledge of vice-principal that wires were charged.—A lineman was injured while working on one of the poles of an electric light company by coming in contact with a charged wire. He had no knowledge that the wire was charged with electricity, but this fact was known to the repre-

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sentatives of the electric light company. The wires upon the pole were improperly placed. It was held that the defendants were guilty of negligence.	
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<i>Allegation as to defendant's knowledge of negligent construction.</i> —	
An allegation that the construction of the wires causing the injury was defective, and that the plaintiff had no knowledge of the same prior to the time he was injured and that the defendants negligently and carelessly operated said electric wire, and permitted said deadly current of electricity to be transmitted over and through said electric wire, as aforesaid, without warning to the plaintiff, is sufficient.	Idem.
<i>Fellow servants; street car conductor injured by negligence of car inspector.</i> —A conductor of a street car and a car inspector employed by a street railway company to inspect the electrical apparatus of its street cars are fellow servants; the company is not liable for the death of a conductor caused by the negligence of the inspector.	
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<i>Injury to lineman by falling from telegraph pole; evidence as to use of safety strap.</i> —Where in an action brought by a lineman for injuries received by falling from a telegraph pole because of an electric shock received by contact with a charged wire, the manager in charge of the work had testified that the accident would not have occurred if the plaintiff had made sure the current was off before beginning his work, or if he had used a safety strap to prevent falling, it was held proper to admit testimony as to the manager's statement that the plaintiff was not to blame for the accident. The question of contributory negligence of the plaintiff in failing to attach himself to the pole by means of a safety strap is for the jury to decide in the light of all the conditions disclosed by the evidence.	
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<i>Foreman as vice-principal.</i> —A foreman in charge of and engaged in, the work in which the lineman was engaged when injured might properly be assumed to be a vice-principal, and not a fellow servant.	Idem.
<i>Superior servant rule.</i> —The superior servant rule as a limitation upon a master's exemption from liability to the servant for the negligence of a fellow servant does not obtain in New Jersey.	
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Foreman as vice-principal.—A defendant telegraph company employed a general superintendent to take charge of the erection of telegraph wires, and such superintendent designated a foreman to direct the men under him in the performance of their work. The evidence was considered and held sufficient to show that a person designated as foreman was acting in such capacity when the lineman was injured. The fact that such foreman received no greater wages than the other linemen was immaterial as bearing upon the question as to whether the foreman was a vice-principal.

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Injury to employee of city; liability of city.—A city is liable for the negligence of its superintendent employed to direct the operation of a fire alarm system causing injury to a person employed by him.

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Injury caused by negligence of fellow servant.—Where the injury was caused by the negligence of fellow servants he cannot recover, unless it be shown that the city was negligent in failing to adopt such precautionary measures as would have prevented the injury.

Idem.

Adoption of rules.—A city is not liable for a failure to adopt rules for the guidance of employees engaged in cutting electric wires belonging to a fire alarm system.

Idem.

Use of rubber gloves and boards to stand upon.—An employee will be deemed to have assumed the risk of his employment where he is working in connection with electric wires for two and a half months without the protection of rubber gloves and wooden boards to stand upon.

Idem.

Knowledge of danger.—An employee cannot be said to be without knowledge of the danger of his employment where he has been warned from time to time of the danger of being killed while performing his duties in proximity to electric light wires, and to have heard his fellow servants say that they had received shocks while in the same employment, and who had witnessed the effect of electricity on a horse communicated by a sagging wire.

Idem.

Expert testimony as to stringing wires.—Expert testimony is admissible for the purpose of showing the number of linemen which should be employed in stringing telegraph wires over feed wires of electric light companies, and as to where such linemen should be stationed.

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Admissibility of evidence as to methods.—Evidence is admissible to show ordinary and usual methods existing among telegraph and telephone companies in regard to providing insulators, and as to the number of wires that should be strung at any one time.

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<i>Electric light poles; defective rods.</i> —An electric light company held liable for injuries to employee caused by defective iron tubes supporting electric lamp.		
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<i>Failure to inspect.</i> —Electric light trimmer not liable for failure to discover defects in rods, it not being made his duty to inspect, and not being furnished with tools for the purpose.		
		Idem.
<i>Failure to inspect pole before climbing, contributory negligence when it appears that defect could have been ascertained by digging a few inches below the ground.</i>		
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<i>Poles falling; failure to furnish proper tools.</i> —A telephone company is liable for injuries caused by a falling telephone pole when proper pikes and tools are not furnished.		
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<i>Defective cross-arms; liability of company.</i> —When the defect in a cross-arm is invisible because of paint, and could not have been discovered by reasonable diligence on the part of the defendant company, it is not liable.		
Maryland Telephone & Teleg. Co. v. Cloman.		755
<i>Injury to lineman by break; assumption of risk.</i> —A lineman who climbs upon the cross-arm of a telephone pole for the purpose of repairing the wires attached thereto, whose duty it is in the course of his employment to inspect the sufficiency of the cross-arm to bear his weight, and who makes no such inspection, assumes the risk of his employment and cannot recover for injuries received in falling from the pole because of the breaking of the cross-arm.		
Roberts v. Missouri & Kansas Teleph. Co.		767
Assumption of risk, see note p. 776.		
<i>Injury caused by defective insulation of electric light wire.</i> —An employee in a mill was injured by an electrical shock received from placing his hand upon the frame of a machine at which he was working; the alleged neglect of the defendant consisted in a failure to inspect the electric light wires. It was held that the defendant was not negligent in failing to make such inspection since the lighting system had only been installed for a few months, and there was nothing to show that the insulation upon the wire from which the electricity came would not have remained intact for many years.		
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Negligence inferred from defective insulation.—In an action brought by a lineman of an electric light company for injuries caused by contact with live wires, it was held that it was not erroneous to instruct the jury that failure to make reasonable effort to provide a safe working place for the employee, and consequent negligence, might be inferred from the mere fact that the wires were not insulated, if the jury found that reasonable care would have required their insulation.

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Due care of lineman.—Whether or not due care on the lineman's part required that he see and avoid contact with the uninsulated wires was properly left to the jury.

Idem.

Duty to inspect same; assumption of risk.—The question as to whether or not the lineman had assumed the risk from lack of insulation is for the jury where it appears that no inspectors were employed and that the lineman was instructed to repair or report defects of insulation observed by him.

Idem.

Lineman injured by defective wire; duty of foreman to instruct as to danger.—Defendant is liable for an injury caused to one of its linemen by contact with live wire where it appeared that its foreman had received information as to the defective condition of the wire, and had not instructed the lineman as to the specific danger.

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Duty to instruct.—As to master's duty to instruct unskilled and inexperienced servants employed about electrical machinery, see

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Injury to unskilled employee by contact with live wire; duty to instruct.—An unskilled laborer employed by an electric company in digging holes for electric light poles, if directed to perform services about electric wires, should be instructed as to the danger of the work, and in the absence of such instruction the company is liable for an injury caused by electrical shock.

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Injury to employees of electric company.—As to the assumption of risk by employees of electric companies and the duties and liabilities of such companies in respect to their employees, see note to

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Duty to protect; notice of defect.—An employee has a right to assume that his employer has taken due precaution to insure his safety, and that the tools, appliances and material furnished by the employer are reasonably safe. But it is otherwise where the employee

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has notice of the defective condition of such tools, appliances and material, or of facts sufficient to put a man of ordinary prudence on inquiry.	
New Omaha Thomson-Houston Electric Co. v. Dent.....	648
<i>Where contributory negligence</i> is relied upon as a defence, the burden of proof is upon the defendant, unless such negligence is disclosed by petition or by the plaintiff's evidence. Where the evidence is such that reasonable minds might honestly differ as to the inference to be drawn in respect to the question of negligence or contributory negligence, a finding either way can be said to be insufficiently supported by evidence.	
New Omaha Thomson-Houston Electric Light Co. v. Dent..	648
<i>Injury to employee of contractor by contact with wire.</i> —The plaintiff was employed by a contractor who had entered into a contract to paint the supporting poles of the defendant's trolley system. While engaged in sandpapering one of such poles he came in contact with an electric feed wire and was severely injured. It was held that the measure of the defendant's obligation was to use reasonable care under such circumstances to protect the workman against injury.	
Kenneally v. Westchester Elect. Ry. Co.....	827
<i>Negligence; evidence.</i> —The trial court held that, under the complaint, the negligence of the defendant must be based upon the defective construction of the feed wire in the first instance; and under this ruling the plaintiff was required to establish that the alleged defective insulation of the wire existed at the time it was placed upon the pole as a part of the original construction. The jury passed upon this question and decided that it was originally defective. It was held that the evidence was sufficient to justify this finding.	Idem.
<i>Linemen trimming arc lamp.</i> —Where it appears from the evidence that an experienced lineman in attempting to start an arc light in the night time met his death by making a short circuit by contact with an uninsulated wire and the lamp carbon, which could have been avoided by use of a short wooden stick, the necessary inference is that the lineman was contributory negligent.	
Bowers v. Bristol Gas & Elect. Co.....	743
<i>Lineman struck by tie wire; incompetency of fellow servant.</i> —Defendant telegraph company not liable for injury to lineman caused by tie wire breaking from insulator, in the absence of proof that the fellow servant, whose negligence caused the break, was incompetent to the knowledge of the defendant.	
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Injury occasioned by a defective cut-off box.—Where the injury complained of was alleged to have been caused by a defect in a cut-off contrivance, it was held error to exclude evidence tending to show that the condition of the cut-off box was such as to indicate to the foreman in charge of the work that the current of electricity was cut off.

Dallas Electric Co. v. Mitchell..... 692

Liability of receiver of corporation as employer.—Although ordinarily where a receiver is in charge of the property of a corporation the corporation is not liable for injuries resulting from the negligent operation of such property by the receiver, yet if the corporation remains in joint control and management of its property with the consent of the receiver, the liability of the corporation continues.

Idem.

Safety belt; failure to use contributory negligence.—The plaintiff knew that linemen ordinarily wore safety belts furnished by themselves, when working upon telephone poles, so as to prevent a fall if the cross-arm broke. His failure to equip himself with such device was contributory negligence.

Roberts v. Missouri & Kansas Teleph. Co..... 767

Rubber gloves.—Failure to use rubber gloves when provided is contributory negligence.

Hart v. Allegheny Co. Light Co..... 832

Magneto bell and test set.—Where a lineman was furnished with a magneto bell and test set to ascertain presence of electric current in a wire, which he failed to apply before the accident causing his death, it was held for the jury to determine whether such instruments were designed to test insulators and defects therein.

Jackson & Suburban St. R. Co. v. Simmons..... 834

Employee of one company injured by contact with wires belonging to another company.—It is the duty of an electric company to so operate its plant as to prevent an injury to those who, while engaged in a lawful occupation about such wires, come in contact with them. So where a lineman was killed while employed in transferring wires belonging to the company by which he was employed by contact with a defectively insulated wire of another company, such other company is liable.

Standard Light & Power Co. v. Munsey..... 714

Agreement between electric companies as to use of poles.—Where two companies enter into an agreement for the joint use of poles, it is the duty of one company to use ordinary care to prevent the employees of another company from being injured by a defectively insulated wire.

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<i>Failure to use contrivance for shutting off current</i> is not such contributory negligence upon the part of the employee as will relieve the defendant from liability for a failure to properly insulate its wires, unless it can be shown that the employee knew of the failure to cut off current.	Idem.
<i>Contact with wires of another company.</i> —Finding of jury as to negligence of electric light company in permitting its wires to become defectively insulated, causing death of lineman employed by telephone company, sustained.	
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<i>Defective insulation</i> of electric light wire, causing injury to telephone lineman, see	
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<i>City ordinance</i> requiring use of "waterproof" insulation; instruction as to use of substitute not being as effectual to prevent passage of current sustained.	Idem.
(See also note on p. 810.)	
<i>Contributory negligence.</i> —If lineman believed that the defendant had properly performed its duty as to covering its wires with "waterproof" insulation, which might have prevented the injury, he cannot be charged with contributory negligence for omitting precautions which he might have taken to avoid the danger, and for permitting the wire which he was handling to come in contact with the defendant's electric wire.	Idem.
<i>Current in electric light wire in day time.</i> —If the lineman was justified in believing that no current would pass through the defendant's electric light wire while he was at work about it, then he was not required in the exercise of reasonable care to take precautions against such current.	Idem.
<i>Joint liability</i> of telephone company for permitting its wires to come in contact with an electric light wire, of city and its contractor for erecting defectively insulated electric light wire, see	
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<i>Instruction to jury.</i> —Telephone company cannot complain of instruction not properly defining degree of care to be used by city and its contractor in maintaining its wires.	Idem.
<i>Instruction as to notice</i> of danger on the part of the telephone company not objectionable as tending to relieve city and its contractor of liability.	Idem.

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Contact of derrick cables with electric wire.—Liability of contractors for death of employee by electric shock received by cables of derrick coming in contact with electric wire.

Klages v. Gillette-Herzog Mfg. Co..... 819

Electric light inspector injured by contact with wires of electric light and telephone companies cannot recover where it appeared that he was an experienced man, that it was his duty to adjust difficulties interfering with lights and that he had been provided with rubber gloves, but had neglected to use them.

Hart v. Allegheny Co. Light Co..... 832

Presumption as to proper insulation.—Instruction to jury erroneous, which states that lineman of telephone company, who was killed by contact with electric wires of street railway company, had a right to presume that they were properly and safely insulated unless the want of insulation or defective insulation was plainly apparent to him in the exercise of ordinary and reasonable care.

Jackson & Suburban St. R. Co. v. Simmons..... 834

Lineman in contact with uninsulated wire; evidence.—Telephone lineman shocked to death by contact with uninsulated wire of another company, while aiding in the erection of a telephone pole on corrugated iron awning; evidence to show that awning had been frequently used by persons going thereon to repair the same held admissible, since it tends to show negligence in failing to provide proper insulation at a place where others may go, either for work, business or pleasure.

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FRANCHISE.

Ordinance granting franchise.—When a city charter prescribes that franchises can be granted by ordinance, it is not competent to make such a grant by resolution, nor can an ordinance for such a purpose be amended by resolution.

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<i>Ordinance granting franchise</i> and accepted by the company constitutes a contract binding upon the municipality and the company. Baxter Springs v. Baxter Springs Light & Power Co.....	125
<i>Company not in existence</i> .—It is not material that at the time the ordinance granting the franchise was presented the company was not fully organized, if the organization was complete and the company could transact business when the ordinance was passed and accepted. Chicago Teleph. Co. v. Northwestern Teleph. Co.....	81
<i>Franchise to company not yet organized</i> .—An abutting owner cannot raise the question that at the time the franchise was granted the company was not yet organized. Such an ordinance may be premature and irregular, but the defect may be waived by the acceptance of the franchise by the company. McWethy v. Aurora Elect. Light & P. Co.....	220
<i>Acceptance</i> .—Franchise to a telephone company for the use of a street is not effectual until accepted. Chicago Teleph. Co. v. Northwestern Teleph. Co.....	81
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<i>Revocation after grant is accepted</i> .—A franchise granted to a telephone company, by municipal ordinance, amended by resolution and accepted as amended, is irrevocable unless power to revoke or alter is reserved. Morristown, City of, v. East Tennessee Telephone Co..... (See note on p. 11.)	3
<i>Not revokable</i> .—A telephone company having a franchise for the erection and operation of its poles and wires and having established its plant in reliance thereon has a vested right which cannot be revoked by the city, except within the exercise of its police power. Duluth v. Duluth Teleph. Co.	136
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<i>Similar franchise to subsequent grantee</i> .—A franchise for the use of streets to one telephone company does not preclude a grant of a similar franchise to another company.		
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<i>Rights of prior grantee</i> of franchise to use streets for telephone purposes are superior to those of a subsequent grantee of a similar franchise.		
Northwestern Teleph. Exch. Co. v. Twin City Teleph. Co..		103
Unnecessary interference with the rights of the former company by a subsequent company may be restrained.		
		<i>Idem.</i>
But the prior occupant must exercise its privilege so as to give room to another company coming in under a franchise lawfully granted.		
Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co.		108
<i>Rights under subsequent franchise</i> .—A telephone company subsequently granted a franchise may erect its wires above those of a prior company. Mere inconvenience because of such an arrangement will not afford ground of complaint.		
Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co.		108
<i>A statute</i> , providing for the sale of franchises upon its adoption by the vote of a municipality, does not affect the rights of a telephone company under a franchise granted prior to the enactment of such statute.		
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<i>For extension of telephone lines; ordinance requiring commissioner of public works to designate location of poles must be complied with.</i>	
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<i>Electric conduits.</i> —A statute authorizing an electric light company to use certain electric conduits does not confer an absolute franchise in the street.	
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Statute as to use of electrical conduits construed so as to require an applicant for the use thereof to first procure a franchise for the use of the streets.	
Purnell v. McLane, Mayor of Baltimore	55
<i>Electric light company</i> not entitled to franchise under Mo. statute of 1893, authorizing franchise for light and water.	
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<i>Repeal of ordinance granting franchise to electric light company.</i> — A common council cannot repeal an ordinance granting permission to an electric light company to place its poles and stretch its wires on all the streets and alleys of the town when the company has conformed to the conditions of the ordinance so far as required, and has expended money in placing the poles and wires on certain of the streets, notwithstanding the common council may have been misled in passing the ordinance.	
Phillipsburg Elect. L., H. & P. Co. v. Phillipsburg.	149
That the officers, managers, and stockholders of the company are different individuals from those who were stockholders when the permission was granted, gives no ground for the repeal of the ordinance.	Idem.
If the corporation is violating its charter or the laws of the State, it is liable to a proceeding to forfeit its charter, but the ordinance of the common council, granting permission to erect poles and wires, cannot for that reason be repealed.	Idem.
<i>Electric light.</i> —Bond may be exacted to secure completion of works. Sum specified may be considered as liquidated damages.	
City of Salem v. Anson	44
<i>Electric lighting franchise</i> granted by a municipality is not exclusive and does not preclude the municipality from erecting and operating a lighting system of its own.	
City of Joplin v. Southwestern Missouri Light Co.	66

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A gas company, having an exclusive right to the use of city streets for furnishing gas to a city, which is granted an electric lighting franchise cannot assert its exclusive privilege to the detriment of an electric light company which has acquired a franchise from the city.

People's Elect. Light & P. Co. v. Capital Gas & Elect. Light Co. 71

Post roads act (Act of Cong. 1866, ch. 230, 14 Stat. 221) does not dispense with necessity of grant of franchise of municipality to use streets for telegraph lines.

Postal Teleg. Cable Co. v. City of Newport 25

HIGHWAYS.

Injury to traveler by wire dislodged by falling tree.—Where it appeared that the defendant was negligent in stringing its wires around a curve in a highway and in using improper brackets to support such wires the defendant is liable for injuries caused to a traveler by the falling of such wires, although the wires might have been dislodged by a falling tree.

Ela v. Portland Telegraph & Cable Co. 423
See WIRES.

Telegraph and telephone lines, erection and maintenance in streets and highways constitute an additional servitude for which compensation should be made.

Bronson v. Albion Telephone Co. 177
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Burning out of a fuse; negligence.—A fuse as used in the machinery connected with an electric car is a safety device to prevent injury to the electric mechanism arising from variation in the electric current. The fuse is expected to burn out when, for any cause, the electric current exceeds the carrying capacity of the mechanism. When, therefore, a fuse burns out it is not *prima facie* evidence of negligence.

Cassaday v. Old Colony St. Ry. Co..... 915

Location of fuse-box.—While the mere burning out of a fuse properly located and in proper condition does not import negligence, yet if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers, and, therefore, upon this question the plaintiff had a right to go to the jury.

Idem.

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Doctrine of res ipsa loquitur.—Where the evidence warrants a conclusion that the intensity and duration of the flame caused by the explosion was greatly in excess of what would have been the result if the fuse had been in proper condition, and that its imperfect condition might have been discovered by the use of reasonable care, the defendant is not entitled to a ruling to the effect that the doctrine of *res ipsa loquitur* does not apply. It was proper to instruct the jury that the matter was before them to decide how far negligence could be inferred from the accident itself.

Idem.

Presumption as to cause.—If the cause of the accident does not clearly appear from the evidence, or if there is a dispute as to what it is, the plaintiff may argue upon the whole evidence, and the jury may rely upon presumptions, unless they are satisfied that the cause had been shown to be inconsistent with it.

Idem.

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Highways include.—So held as to statute authorizing use of public highways by telegraph and telephone lines. (Iowa Code, 1873, sec. 1324.)

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Public roads do not include streets, so held under Neb. Comp. L. 1901, ch. 89a, sec. 14.

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Post Roads Act (Act of Cong., 1866, ch. 230, 14 Stat. 221) does not authorize use of city streets without consent of local authorities.

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Constitutional provision (Ky. Const., sec. 163) requiring consent of local authorities for use of streets by telephone company must be complied with.

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Injunction will not issue by one telephone company to prevent use of streets by another similar company where the former company has not complied with constitutional provision (Ky. Const., sec. 163) as consent of local authorities.

East Tenn. Teleph. Co. v. Anderson Co. Teleph. Co. 19

Unlawful interference by one telephone company having a franchise for the use of streets with the poles and wires of another company occupying the streets under a prior franchise will be restrained.

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<i>Franchise granted by city council</i> to construct and maintain a telephone system does not authorize such use without compensation.		
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<i>Use by electric light companies</i> .—Where fee of streets is in the city, an electric light company may be authorized to erect its poles in the streets, provided they do not materially obstruct public travel.		
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Electric light companies organized under the general corporation act of New Jersey have authority to erect poles and to string and maintain wires in the public highways upon first obtaining the consent of the owners of the soil.

Point Pleasant Elect. L. & P. Co. v. Borough of Bay Head..

An owner of a lot abutting on a street dedicated to public use by an owner who subdivides lots for sale, has a property interest in the street in front of his lot, which cannot be taken against his will, except upon the terms provided by the Constitution, viz., that a compensation shall first be made in money, or by a deposit of money.

Callen v. Columbus Edison Elect. L. Co..... 241

Use by private lighting company is a diversion of the street from the purposes for which it was dedicated.

Idem.

Destruction of public improvement.—Before an individual or company may invade and destroy, in whole or part, for other public purposes, a public improvement placed on the street by an abutting lot owner in front of his property, under agreement with the council of the city, town, or village, specific authority for so doing must first be obtained from such council.

Maxwell v. District and Printing Teleg. Co..... 206

Statute authorizing removal of obstructions.—The borough act (P. L. 1897, p. 296), empowering borough councils by ordinance to regulate the streets of the borough, to remove obstructions and nuisances therefrom, and to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of the streets, confers a power which can only be exercised by the passing of an ordinance.

Point Pleasant Elect. L. & P. Co. v. Borough of Bay Head.. 230

Consent of abutting owners.—Statute (Hurd's Ill. Stats., 1899, ch. 24, par. 491) requiring consent of owners of adjoining lands before grant of franchise for use of streets by electric light company does not apply to company exercising franchise granted prior thereto.

McWethy v. Aurora Elect. Light & P. Co..... 220

Conduits, the wires therein and manholes constructed and maintained in the streets of a municipality remain the property of the company putting them in, subject to the easement of the public in the use of the street as a thoroughfare.

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Liability for injury to manhole.—If the municipality lawfully permits private property to be placed and kept in a street or highway, and this property is damaged by the carelessness of another, the owner of such property may recover compensation for the injury so done. If, therefore, a manhole was put down in the street by an electric company a right of action exists in favor of the company, if such manhole is tortuously broken.

Idem.

Rights of telephone and other electrical companies stringing wires in streets. See note to

Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co.

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Notice of dangerous condition of electric wires.—The disturbed condition of a city telephone and fire alarm system is notice to the city that the wires may be broken and down, and imposes upon the city officials the duty of investigating so as to ascertain if the wires constitute a dangerous obstruction.

City of Emporia v. Burns

416

Injury to pedestrian falling over concealed wire.—A plaintiff was injured in crossing a street by catching her foot in a wire lying concealed in the grass, but attached at one end to a pole. In the absence of evidence as to who was the owner of the wire, or responsible for its being in the place where the accident occurred, the plaintiff could not recover.

Lee v. Maryland Telephone & Telegraph Co.

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Injury by falling trolley wire.—Evidence considered and held sufficient to justify jury in finding that there was negligence upon the part of the defendant street railway company on the construction of the trolley wire which had fallen and injured the plaintiff while standing in the street.

Memphis Street Railway Co. v. Cartwright

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Liability of telephone company for injuries caused by poles.—Under the Massachusetts Statute (Rev. Laws, ch. 122, sec. 15), where a person is injured by being thrown from a wagon colliding with a telephone pole, the company is liable for the damages caused by such injury, although the pole was erected and maintained by the company in accordance with a license granted by the proper municipal authority.

Riley v. New England Telegraph & Telephone Co.

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Contributory negligence.—Such statute does not make the company an insurer against injuries to persons whose own fault is one of the causes of the injury.

Idem.

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Death of horse caused by contact with live wire.—Where an electric wire had fallen in the street by reason of sleet adhering to it, and without the negligence or fault of the defendant, defendant is not liable for the death of the plaintiff's horse caused by contact with such wire.

Colburn v. Mayor, etc., City of Wilmington 457

Contact with live wire; broken telephone wire hanging across electric light wire; joint liability.—Where the pole on which an electric light wire is suspended was shown to be unfit and not braced as it ought to have been, and it appeared that after a heavy rain storm the electric light wire had sagged and come in contact with the telephone wire, and had fallen across the telephone wire to the ground, the current from the electric light wire being turned off at some distance from the point of contact, and the plaintiff was injured by coming in contact with such broken electric light wire, it is sufficient to show a concurrent neglect upon the part of both the telephone and electric light company and that the negligence was joint in its character.

Economy Light & Power Co. v. Hiller 462

Injury to horse by contact with live wire; evidence.—Where it appears that the driver of a horse, upon the horse suddenly falling in the street to the ground, observes for the first time a wire hanging close to the wheel of his wagon, emitting sparks and flames of light and subsequently, and that while the horse was struggling to his feet he was seen to come in contact with the wire, whereupon he again fell, it was held sufficient to show that the horse was injured by an electric shock received from contact with a live wire.

Chaperone v. Portland General Electric Co. 468

The doctrine of *res ipsa loquitur* was applied and plaintiff was relieved from the burden of proving the unsafe and insecure condition of the wire. The question as to whether the presumption of neglect had been overcome by the defendant was held to be one of fact for the jury.

Idem.

Contact with live wire maintained by municipality.—A municipality is not excepted from the rule as to the degree of care to be used in the operation of electric wires; so where a police call wire maintained and operated by a city breaks and falls in the street, and a boy is injured by coming in contact therewith, such city is liable where it appears that the police officials knew of the condition of the wire prior to the accident.

Herron v. City of Pittsburg 482

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Injury to animal by contact with live wire; contributory negligence.

—In an action to recover for the death of a mule occasioned by contact with a telephone wire suspended in the street, it appeared that the defendant negligently permitted the wire to fall across a trolley wire and thereby become charged with a deadly current causing the death of the plaintiff's mule by contact therewith, it was held that the negligence of the defendant was the approximate cause of the death, and that the driver was not chargeable with contributory negligence because of his failure to observe the presence of the wire.

Jones v. Finch 497

Contact with live wire hanging from electric light pole.—An electric light company is liable for injuries caused by contact with a live wire hanging from an electric light pole to a point not more than a foot or two above the sidewalk, where it appears that such wire had become charged with a dangerous current of electricity by contact with an electric light wire at a point where the insulation was defective.

Wehner v. Lagerfelter 586

Injuries to travelers by wires falling in streets. See note to

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Injuries to employees.

See EMPLOYEES. See, also, ABUTTING OWNERS; EMINENT DOMAIN; FRANCHISE; HIGHWAYS; MUNICIPALITIES; POLES; WIRES.

TAXATION.

An annual license tax imposed upon a telegraph company for the use of city streets is a compensation for the servitude imposed upon the streets and is not in the nature of a burden upon interstate commerce under the guise of a license tax.

Postal Teleg. Cable Co. v. City of Newport. 25

Validity of license tax upon telegraph companies.—A license fee imposed upon a telegraph company by a city to compensate the city for the expense of the supervision of the poles and wires of such company is not in violation of the constitutional provision as to the regulation of interstate commerce by Congress. Such a fee may be large enough to cover reasonably anticipated expenses; the charge cannot be avoided, unless it appears that it was in excess of the actual expense of such supervision.

Atlantic & Pacific Teleg. Co. v. City of Philadelphia. 369

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Reasonableness of license fees for the jury.—When the question of the reasonableness of an ordinance imposing a license fee upon a telegraph company turns upon the reasonableness of the amount of such fee it may rightly be left for the determination of a jury.

Atlantic & Pacific Teleg. Co. v. City of Philadelphia..... 369

Occupation tax upon telegraph company.—A reasonable occupation tax may be imposed by a village upon telegraph companies occupying the streets. Such tax cannot include interstate business or the business of the government of the United States.

Western Union Teleg. Co. v. Village of Wakefield..... 380

License fees for use of streets and highways by telegraph and telephone companies. See note to

Western Union Teleg. Co. v. Village of Wakefield..... 385

Tangible property of telegraph company.—The tangible property of a telegraph company within a State is subject to State taxation. In determining the value of such property it is proper to compare the length of the company's lines within the State with that of its entire lines, or to take the aggregate value of its capital stock and deduct therefrom the proportionate valuation of its lines without the State, and also the value of its property subject to local taxation.

State ex rel. Gottlieb v. Western Union Teleg. Co..... 390

Franchise of telegraph company.—The franchise of a telegraph company is taxable in the State where its lines are located.

State ex rel. Gottlieb v. Western Union Teleg. Co..... 390

Real estate of telephone company.—A statute imposes a State tax upon the poles, wires, instruments, apparatus and fixtures of all kinds of telephone companies, and it further provides that such companies shall be taxed only in the mode prescribed therein, except upon real estate not used in their ordinary business; it precludes local taxation on the real estate of such companies used in their ordinary business.

New England Telephone & Telegraph Co. v. City of Manchester 399

Telephone companies, taxation of. See TAXATION.

A city ordinance imposing a tax on telephone poles and conduits is not unconstitutional.

Postal Telegraph Cable Co. v. City of Norfolk..... 401

License fees on telephone companies.—A city having granted a franchise to a telephone company for the use of its streets cannot impose a license fee upon such company for such use.

Sunset Telephone & Tele. Co. v. City of Medford..... 402

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Franchise tax on electric light company.—An electric light company formed by the consolidation and merger of several corporations, some of whom possess and exercise municipal franchises, and which, since its formation, has exercised such franchise, is subject to taxation under section 4 of the Act of March 23rd, 1900 (New Jersey Pub. Laws, p. 502) for the taxation of franchises.

Paterson & Passaic Gas & Elec. Light Co. v. State Board of Assessors 403

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Right to use streets must be by legislative authority.

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Post Roads Act does not confer authority to use city streets without municipal franchise.

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Statute authorizing use of public highways includes city streets. (Iowa Code, 1873, sec. 1324.)

Chamberlain v. Iowa Telephone Co. 11

Authorizing use of "public roads" does not include streets of municipality. (Comp. L. Neb. 1901, ch. 89a, sec. 14.)

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Duty as to construction of trolley wires.—In view of the danger attending upon the breaking and falling of overhead electrical wires in streets, an electrical railway company should be held to the highest or utmost degree of care in the construction, maintenance and operation of its lines.

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Injury from wire in highway dislodged by falling tree.—Where it appeared that the defendant was negligent in stringing wires on the inside of poles placed on the outside of the curve of a highway at the place where the accident occurred and in using improper brackets to support the wires, it was held that the defendant was liable although it was shown that the wire causing the accident might have been dislodged by a tree felled against it by the owner of abutting lands.

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and not braced as it ought to have been, and it appeared that after a heavy rain storm the electric light wire had sagged and come in contact with a telephone wire, and had fallen across the telephone wire to the ground, the current from the electric light wire being turned off at some distance from the point of contact, and the plaintiff was injured by coming in contact with such broken electric light wire, it is sufficient to show a concurrent neglect upon the part of both the telephone and electric light company, and that the negligence was joint in its character.

The neglect of the defendant telephone company consisted of its failure to repair the wire which from the evidence was shown to have been burned out to the probable knowledge of the company, and to remove such dangerous wire before the accident. An instruction to the jury as to the joint neglect of the two companies was sustained.

Idem.

Injury to horse killed by live wire in streets; insufficiency of complaint.—A complaint alleging in effect that the defendant was negligent in carelessly and negligently allowing and permitting a wire heavily charged with electricity to become broken and hang down upon the street where the plaintiff's horse was being driven, and that without the fault of the driver the horse was brought in contact therewith whereby the injury ensued, is sufficient without further allegation that the defendant negligently and carelessly brought about or permitted the actual contact.

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Presumption of neglect; doctrine of res ipsa loquitur.—Evidence to the effect that the wire was found broken and suspended in the public street, and that the injury to the horse ensued was held sufficient to establish a *prima facie* case, and to impose upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not attributed to any neglect upon its part. The doctrine of *res ipsa loquitur* applied and the plaintiff was relieved from the burden of proving nonexistence of an adequate explanation or excuse. The question as to whether the presumption of negligence has been overcome by the defendant is one of fact for the jury.

Idem.

Reasonable time to repair defect.—It is not error to refuse to charge the jury that the defendant was entitled to a reasonable time, after the fall of the wire which caused the injury, to remove or repair it. Such instruction is applicable only where the wire has fallen without the neglect of the defendant, or was caused by the act of God or some force that could not have been provided against by reasonable foresight or precaution.

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Broken trolley wire in street.—A street railway company is bound to exercise such care to prevent injury by a broken trolley wire as a reasonably prudent man would exercise under such circumstances considering the dangerous character of the wire and the existing conditions; a traveler in a highway may assume that it is reasonably safe, and is not required to search for obstructions and dangers therein.

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Death of mule caused by contact with live wire in street.—A defendant telephone company was held liable for the death of a mule caused by contact with a telephone wire hanging across a trolley wire into the street. The plaintiff had a right to assume that the street was free from such a dangerous obstruction, and is not chargeable with contributory negligence for a failure to observe its presence.

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—The city is not excepted from the rule as to the degree of care to be used in the operation of its electric light wires. Where a boy is injured by coming in contact with a police call wire, which had broken and become charged with electricity by contact with the feed wire of an electric railway, the city is liable if negligence be shown.

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Contributory negligence.—Where a boy inadvertently or purposely touches a deadly electric wire within easy reach without knowledge of danger he is not guilty of contributory negligence.

Idem.

Contact with live guy wire.—Contributory negligence is not conclusively established by voluntary contact with a live guy wire where it appears that such guy wire had been charged with electricity for several days with notice to the defendant, and that such wire had been handled by various parties during that time.

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Idem.

Assumption as to insulation.—In places where an electric light wire should be insulated for the safety of persons, one may assume they are so insulated if he did not know to the contrary.

Idem.

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<i>Defective wiring; death by fire.</i> —A complaint alleging that the defendant company was charged with the duty of so erecting its wire as to enable the passage of an electric current over the same with safety to the occupants of buildings and to the buildings themselves, and that such company was grossly negligent in performing such duty, states facts sufficient to constitute a cause of action against an electric company for the death of the plaintiff's son, who was confined in the county jail, and was killed by the building catching fire from an alleged defect in the electric wiring thereof. Miller v. Ouray Electric Light & Power Co.....	611

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